TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 279.

IDA WINTER BRINE, BY GEORGE J. BRINE, HER GUARDIAN AD LITEM, APPELLANT,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 22, 1875.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-sixth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 17th day of December, A. D. 1874, came said complainant, by its solicitors, Mess. Paddock and Ide, and filed in the office of the clerk of the circuit court of the United
2 States for the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs, and at the same time filed its bill of complaint in said-entitled cause; which said bond for costs and bill of complaint are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, term A. D. 1874.

THE HARTFORD FIRE-INSURANCE COMPANY of Hartford, Connecticut, complainant,
vs.
GEORGE BARTALOTT AND ANNA BARTALOTT, his wife, George H. Barbier and Caroline Barbier, his wife, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce, defendants.

We do enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against us.

3 Dated this 17 day of December, A. D. 1874.

PADDOCK & IDE.

(Endorsed:) Filed Dec. 17th, A. D. 1874. W'm H. Bradley, clerk.

REG. 279—1

4 *Bill of complaint.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof, to the December term, A. D. 1874.

To the judges of the circuit court of the United States for said northern district of Illinois:

Your orators, the Hartford Fire-Insurance Company of Hartford, in the State of Connecticut, a corporation organized and existing under and by virtue of the laws of said State of Connecticut, having their principal office and place of business at Hartford, in said Connecticut, and citizens of said State of Connecticut, complainants, bring this their bill against George Bartalott and Anna Bartalott, his wife, both of whom are citizens of the State of Illinois; George H. Barbier and Caroline Barbier, his wife, residents of Philadelphia, and citizens of the State of Pennsylvania; George J. Brine, of Chicago, in said State of Illi-
5 nois, and a citizen of the said State of Illinois; Ida Winter Brine, infant heir of Ida R. Brine, deceased, late wife of said George J. Brine, and a citizen of said State of Illinois; Samuel J. Walker, of said city of Chicago, and a citizen of said State of Illinois; Benjamin E. Gallup, of said Chicago, trustee, and a citizen of said State of Illinois; J. Irving Pearce, of said Chicago, and a citizen of said State of Illinois, defendants.

And thereupon your orators complain and say that heretofore, to wit, on the fifteenth day of March, in the year of our Lord one thousand and eight hundred and sixty-nine, at said city of Chicago, in said northern district, your orators, at the request of said George Bartalott and George H. Barbier, defendants, loaned and advanced of the moneys of your orators to said Bartalott and Barbier the sum of seven thousand dollars.

And your orators further show that the said George Bartolott and George H. Barbier, in consideration of said loan, then and there executed to your orators, by their aforesaid corporate name of the Hartford Fire-Insurance Company, the certain joint and several principal promissory note of said Bartolott and Barbier, bearing date on that day, whereby, five years after that date, the said George Bartolott and
6 George H. Barbier promised to pay your orators the aforesaid sum of seven thousand dollars, with interest thereon at the rate of nine per cent. per annum, payable half yearly, on the fifteenth day of September and March in each year, until said principal sum should be fully paid, and both principal and interest payable at the office of your orators, in Hartford, Connecticut; which said installments of interest for said period of five years were further evidenced by ten interest notes or coupons of even date therewith, executed and delivered by said Bartalott and Barbier to your orators, each in the sum of three hundred fifteen dollars, payable at said semi-annual periods at the office of your orators, in said Hartford, with interest at ten per cent. per annum after maturity.

And your orators further show that, in order to secure the payment of said sum and the interest thereon as mentioned in said promissory notes, the said George Bartolott and his wife, and George H. Barbier and Caroline Anna Bartalott Barbier, his wife, on the day of the date of said notes, executed to defendant Benjamin E. Gallup their certain deed of trust, bearing date on said fifteenth day of March, 1869, whereby it was witnessed that the said George Bartolott and George H. Barbier,

in consideration of such loan of seven thousand dollars, had executed to
your orators, the aforesaid principal and interest promissory notes,
7 and that in consideration thereof, and for the purpose of securing
the payment thereof, and of the further some of one dollar, the said grantors granted, bargained, sold, conveyed, and confirmed to the said defendant Benjamin E. Gallup, his successor in trust and assigns forever, all the certain lot, piece, or parcel of land situate, lying, and being in the city of Chicago, county of Cook and State of Illinois, known and described as follows, to wit:

Commencing at a point on the east line of Reuben street, being the east line of said street, as it is now widened to one hundred feet, at a point one hundred feet north of the northeast corner of Monroe street and Reuben streets, widened as aforesaid; running thence north, on said east line of Reuben street, widened, thirty-three (33) feet; running thence east and parallel with Monroe street, one hundred and fifty feet (150), to an alley; running thence south, with the west line of said alley and parallel with Reuben street, thirty-three feet; running thence west, parallel with Monroe street, one hundred and fifty (150) feet, to the place of
beginning; together with the three-story and basement brick and
8 stone dwelling house, and all other improvements on or that may be placed upon said land; the north line of said premises being the line running east and west through the center of the partition-wall between said dwelling-house and the dwelling house adjoining it on the north; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of said grantors of and to the same, and every part and parcel thereof, to have and to hold the said premises, with the appurtenances, unto the said Gallup, his successors in trust and assigns forever. In trust, nevertheless, that if default should be made in the payment of said principal sum of money, or any interest thereon, at the times aforesaid, or if the said George Bartalott should at any time thereafter, until said principal sum and interest should be fully paid, suffer said premises to be sold for any tax or assessment thereon, or do or permit to be done, in or about
said premises, anything that might in anywise tend to diminish the
9 value thereof or to impair, weaken, or diminish the security under said deed of trust, or if the said grantors, should in anywise fail to keep the covenants and agreements contained in said deed of trust, then it shall be lawful for the said Benjamin E. Gallup, or his successors in trust, on application of the legal holder of said principal note, with *with* or without entry upon said premises, to sell and dispose of the same, and all right, title, and interest of said grantors, their heirs or assigns, at public auction, upon giving the notice and at the time and in the manner mentioned and provided in said deed of trust, and out of the proceeds of such sale should pay all costs and expenses of said advertisement, sale, and conveyance, all premium-money paid for insurance upon said premises or for taxes thereon, with interest at the rate of ten per cent. per annum, all said principal money and interest and interest thereon accrued at the time of such sale, and to render the overplus of such purchase-money, if any, to the said George Bartalott, his executors, administrators or assigns, on request.

And your orators further show that said deed of trust contained an express waiver of all homestead-rights, so called, under and by virtue of any law of the general assembly of the State of Illinois upon the subject of homesteads and homestead-exemption.

10 And your orators further show that in and by said deed of trust, the said George Bartalott and George H. Barbier gave to the said Gallup, in aid of the security intended to be affected by said deed of trust, full covenants of warranty of title in them to the aforesaid premises, and also covenanted with said Gallup and his successors in trust, that they would well and truly pay the aforesaid principal and interest according to the tenor and effect of said promissary notes.

And your orators show that said Reuben street has since and otherwise been known as Ashland avenue, and the aforesaid premises have since been further known and described as sublot four (4) of assessor's division of lots sixteen (16) to thirty-one (31) inclusive, and parts of lots fifteen (15) and thirty-two (32) of block six (6) of the Canal trustees subdivision of the west half, and the west half of the northeast quarter of section seventeen (17), in township thirty-nine (39) north, of range fourteen (14) east, the map whereof was recorded in the office of the recorder of deeds of said Cook County, in book 3 of plats, at page 51, of December fourth (4), A. D. 1872.

And your orators further show that the aforesaid deed of trust was afterwards, to wit, on the fourteenth day of April, 1869, duly acknowledged by the said George H. Barbier, before H. P. Parmalee, a
11 notary public of the said city of Chicago, Cook County, in the State of Illinois, as will appear by the certificate of said Parmalee in that behalf, duly indorsed thereon under his notarial seal; and that afterwards, on the nineteenth day of April, 1869, the said deed of trust was duly acknowledged by said George Bartalott and Anna, his wife, as also by said Caroline, wife of said George H. Barbier, before Thomas F. Manderfield, a notary public of the State of Pennsylvania, city and county of Philadelphia, as will appear by his certificate in that behalf, under his notarial seal, indorsed upon said deed of trust; and that afterwards, to wit, on the twenty-fifth day of May, 1869, your orators caused to be recorded the said deed of trust in the office of the recorder of deeds of said county of Cook and State of Illinois, in book 506 of deeds, at page 408, as will appear by the certificate of Norman T. Gassette, recorder of deeds of said county, endorsed upon said deed of trust. All which matters will appear by the aforesaid deed of trust and the certificates aforesaid, ready to be produced by your orators, to which, for greater certainty in that behalf, your orators crave leave to refer.

And your orators further show that there is now due to your
12 orators the amount of said principal sum, according to the tenor and effect of said principal promissary note, together with large arrears of interest thereon, which principal and arrears of interest amount to a great sum of money, to wit, eight thousand two hundred (8,200) dollars, or thereabout; and that your orators, in addition to the sum last referred to, have been compelled to lay out and expend other large sums of money in and about the insurance of the buildings upon said premises, and in and about the payment of taxes upon the property in said deed of trust mentioned, in order to preserve and protect the lien intended to be vested in said trustee under and by virtue of the aforesaid deed of trust, the precise amount of which expenditures for insurance and taxes your orators are not now able to state, but upon information and belief your orators show that the same are forty-five (45) dollars, and that your orators will produce the proper and certain vouchers in that behalf, upon the taking of the account hereafter prayed.

And your orators further show that no proceedings at law have been had to recover the debt secured by the aforesaid notes and deed of trust, of any part thereof; but that some time since your orators caused the

said trustee to advertise the said premises for sale under said
13 deed of trust, but that said trustee, ascertaining that the said minor was interested in the equity of redemption under said deed of trust, as the heir of the deceased wife of the defendant aforesaid, George J. Brine, desisted from the further execution of the power of sale in said deed of trust mentioned, and declined any further proceedings under said deed of trust; so that your orators are without adequate relief, excepting in a court of equity, where matters of this sort are properly cognizable.

And your orators further show unto your honors, and state upon information and belief, that beside said grantors in said deed of trust said George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce, defendants, have or claim to have some interest in the premises mentioned in said deed of trust, or some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, which interests, if any have accrued long subsequent to the record of your orators' aforesaid deed of trust, and are wholly subject and subordinate thereto.

Your orators therefore ask the aid of the court in the premises, and that the above named George Bartalott, Anna Bartalott, George H.
14 Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce, defendants, may be required to appear before the judges of this court in chancery sitting and to make answer to this your orators' bill, according to the rule and practice of this court, but without oath, their respective answers under oath being hereby waived, and that it may please the court to appoint some discreet and competent person as guardian ad litem of said infant herein; that an account be had in this cause of all the moneys due your orators upon said deed of trust, and the notes therein mentioned; and that on the final hearing herein, the usual decree may be made for the sale of the premises aforesaid, and for the payment of such amount as may be due to your orators, upon the indebtedness aforesaid, with cost of suit herein, and that the said defendants and all persons claiming under them, subsequent to the commencement of this suit, and all other persons, though not parties to this suit, who have any liens by judgment or decree upon the premises subsequent to the said deed of trust, or otherwise, may be barred and foreclosed of all equity of redemption in said premises, and that your orators
15 may have such other and further relief as in your orators' case may be required and as to the court may seem meet and equitable; and may it please your honors to grant unto your orators the usual writ of subpœna in chancery, issuing according to the rule and practice of this court, requiring the said defendants, and each of them, on a day certain, personally to appear in said cause and make answer as aforesaid, and to stand to and abide by such order and decree as may be entered in this cause.

And for the above and such other and better relief as unto equity may appertain your orators do and will ever pray.

PADDOCK AND IDE,
Solis. for said Complainant.

GEORGE L. PADDOCK,
As Counsel.

(Endorsed:) Filed Dec. 17th, 1874. Wm H. Bradley, cl'k.

16 And on the same day, to wit, on the 17th day of December, A. D. 1874, a writ of subpœna issued out of said clerk's office against said defendants in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to George Bartalott and Anna Bartalott, his wife, George H. Barbier and Caroline Barbier, his wife, George S. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of February next, to answer the bill of complaint of the Hartford Fire-Insurance Company, of Hartford, Connecticut, this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
17 preme Court of the United States of America, at Chicago aforesaid, this 17th day of December, in the year of our Lord one thousand eight hundred and seventy four, and of our Independence the 99th.

WM H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that, unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago aforesaid on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM H. BRADLEY, *Clerk.*

I have served the within writ in the following manner, to wit, within my district: Upon Anna Bartelott, therein named, on the 4th day of Jan'y, A. D. 1875; also upon Ida Winter Brine, therein named, on the 4th day of Jan'y, A. D. 1875; also Samuel J. Walker, therein named, on the 8th day of Jan., A. D. 1875, by personally delivering to each of them a true copy of the same, on the aforesaid days. I also served the same upon the following-named defendants, not having been able to find them personally, by leaving a true copy for each of them at their usual places of abode with a free white person above the age of
18 ten years, and a member of their respective families, to wit, upon George Bartalott on the 4th day of Jan'y, A. D. 1875, with Anna Bartalott; also upon George J. Brine on the 4th day of Jan'y, A. D. 1875, with his mother. I did not serve George H. Barbier, Caroline

Barbier, the other defendants, having been unable to find either of them, or that they had any residence within my district.

B. H. CAMPBELL,
U. S. Marshal.
By I. N. BUCK,
Deputy.

(Endorsed:) Filed Jan'y 16th, A. D. 1875. W'm H. Bradley, clerk.

19 Afterwards, to wit, on the 12th day of February, A. D. 1875, in the Decem'ber term, A. D. 1874, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE-INSURANCE COMPANY } In chancery.
vs.
GEORGE BARTALOTT ET AL.

On motion, George J. Brine is appointed guardian ad litem of Ida Winter Brine, infant defendant herein, and he is ruled by the court to answer herein by the first day of March next.

20 Afterwards, to wit, on the 13th day of February, A. D. 1875, in the said December term of said court, in the record of the proceedings thereof in the said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE-INSURANCE COMPANY OF Hartford, Connecticut,
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, and J. Irving Pearce. } In chancery.

Whereas it appears to the court that there is a suit in equity commenced in this court to enforce a legal and equitable lien against the real property mentioned in the bill of complaint herein and situate within said district, and it further appearing to the court upon due proof herein that the above-named defendants, George H. Barbier and Caroline Barbier, are not inhabitants of said district and cannot be found therein, and have not nor has either of them been served with process or voluntarily appeared in this suit: It is hereby ordered by the court, upon motion of Paddock and Ide, solicitors for said complainants, that said absent defendants, George H. Barbier and Caroline Barbier, and each of them, appear herein, and plead, answer, or demur to the
21 said bill of complaint herein, at the office of the clerk of this court at the city of Chicago, county of Cook, and State of Illinois, on or before the first Monday in the month of April, A. D. 1875, and that this order be duly notified to each of absent defendants by publication of a copy thereof for three successive weeks prior to said time in the Chicago Legal News, a weekly newspaper published in said Chicago, and also by personal service of such copy at least twenty (20) days prior to said first Monday of April, A. D. 1875, if practicable, upon such of said absent defendants if practicable.

22 Afterwards, to wit, on the 24th day of February, A. D. 1875, said defendants, George Bartalott, Anna Bartalott, George H. Barbier, and Caroline Barbier, by their solicitors, filed in said clerk's office their joint and several answer to the bill of complaint in said entitled cause, which said answer is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In circuit court thereof. In chancery.

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce.

The joint and several answer of George Bartalott and Anna Bartalott, his wife, George H. Barbier and Caroline Barbier, his wife, defendants above-named, to the bill of complaint of the Hartford Fire-Insurance Company, plaintiffs.

The said defendants, jointly and severally, saving to themselves all exception, &c., to said bill, answering, say: That they did execute
23 certain notes and a deed of trust at or about the time in said bill of complaint mentioned, but as to the terms and conditions of the same respondents cannot now distinctly remember and state the same, and, inasmuch as the same appear by said bill to be in writing and in the possession and custody of said complainants, these respondents crave leave to refer to the same when produced for greater certainty as to their tenor and effect.

And respondents, further answering, say that they believe that said notes have not been fully paid, but they do not know how much, if anything, is now due thereon, and call for proof in that behalf.

And, having fully answered, they pray to be hence dismissed, &c.

By EWING & LEONARD,
Their Solicitors.

(Endorsed:) Filed February 24th, 1875. W'm H. Bradley, cl'k.

24 And on the same day, to wit, the 24th day of February, A. D. 1875, said complainant, by its solicitors, filed in said clerk's office its replication to the answers of George Bartalott, Anna Bartalott, George H. Barbier, and Caroline Barbier, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said district of the term, A. D. 187 .

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin C. Gallup, trustee, & J. Irving Pearce. In chancery.

The replication of The Hartford Fire-Insurance Company, complainant, to the joint and several answers of George Bartalott, Anna Bartalott, George H. Barbier, and Caroline Barbier, defendants.

These repliants, saving and reserving to themselves all and all man-

ner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith, that they do and will
25 aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answers of the said defendants are very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays, as in and by their said bill they have already prayed.

PADDOCK & IDE.
Solicitor' for Complainants.

(Endorsed:) Filed this 24th day of Feb'y, 1875. W'm H. Bradley, clerk.

Afterwards, to wit, on the 27th day of February, A. D. 1875, said defendant Ida Winter Brine, by her solicitors, filed in said clerk's office her answer in said entitled cause, which said answer is in the words and figures following, to wit:

26 *Answer of Ida Winter Brine.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States for the northern district of Illinois. In chancery.

The several answer of Ida Winter Brine, an infant under the age of eighteen years, by George J. Brine, her guardian ad litem, heretofore appointed by the order of this honorable court, one of the defendants to the bill of complaint of the Hartford Fire-Insurance Company, of Hartford, in the State of Connecticut, complainant.

This defendant, answering by her guardian ad litem, saith that she is an infant of the age of eighteen months or thereabouts, and therefore submits her rights and interests in the matters and questions in this cause to the protection of this honorable court.

And, further answering, this respondents says that she admits that she has some interest in the premises mentioned in the said com-
27 plainant's bill of complaint. And this respondent in fact says that on or about the 22nd day of November, in the year A. D. 1870, Samuel J. Walker, one of the defendants in said bill of complaint, was the owner of said premises in fee-simple, and, so being the owner thereof, said Walker on that day made & entered into a written agreement, subscribed by him, the said Walker, for the sale and conveyance of said premises in fee-simple to one Ida R. Brine, which written agreement is in the words and figures following, that is to say:

CHICAGO, *Nov. 2nd*, 1870.

I have this day sold to Ida A. Brine, wife of George J. Brine, the south house of the block on the east side of Ashland ave., commencing about

one hundred feet north of Monroe street, being No. 84, for the sum of eighteen thousand dollars, five thousand dollars of which sum he has this day paid to me. The balance, except an encumbrance of some seven or eight thousand dollars (which he is to assume and deduct) to be paid within twelve months, with eight per cent. interest until paid. Title to be perfect.

(Signed) SAM'L J. WALKER.

[5-cent revenue stamp.]

And this respondent avers that the premises mentioned in the foregoing contract are identical with the premises mentioned in said
28 complainant's bill of complaint, and that on or about the day of the mentioned in said contract the said Ida R. Brine, mentioned in said contract as Ida A. Brine, took possession and moved into said premises and occupied the same as her residence from that time until the time of her decease, as hereinafter mentioned.

That at the time of the execution of said contract said Ida R. Brine paid to said Walker the sum of five thousand dollars, and within one year from the time of the execution of said contract said Ida R. Brine tendered to said Walker and offered to pay to him the balance of the purchase-money specified in said contract, and demanded of said Walker a deed of conveyance of said premises, and said Walker then promised to deliver to said Ida R. Brine such deed, but failed, and ever since has failed so to do, and although said Ida R. Brine was ready and willing to pay said Walker the said balance of said purchase-money at all times and from the time she so tendered and offered the same to the said Walker to the time of her decease. That said Ida R. Brine was at the time of the execution of said contract the lawful wife of said George J. Brine, and on the 8th day of October, in the year A. D. 1873, the said Ida R. Brine departed this life intestate, leaving her surviving as
29 the sole issue of her marriage with the said George J. Brine, and as her sole heir at law, this respondent, Ida Winter Brine, by means whereof this respondent became, and was, and still is vested with the right, title, and interest of the said Ida R. Brine in and to said premises, and this respondent hath at all times since the decease of the said Ida R. Brine occupied the said premises as her residence, with her father, the said defendant, George J. Brine.

And this respondent further saith that she is in equity the owner of said premises in fee-simple, and is entitled to have and receive of and from said Walker a deed of conveyance in fee-simple of the said premises on the payment thereon to the said Walker of the balance of said purchase-money, which she is now, and at all times since the decease of said Ida R. Brine hath been, ready and willing to do.

And this respondent further says that J. Irving Pearce, a defendant in said bill of complaint, claims and pretends that he has a deed to said premises from said Walker, and denies the rights of this respondent in said premises; but this respondent says that said Pearce, if he has any such deed, took the same after the execution of said contract, and
30 after the said Ida R. Brine took full and complete possession of said premises, and while she or this respondent was in full possession thereof, and with full notice of the rights of this respondent in and to said premises.

And the defendant submits to the court that she is and ought to be decreed to be the equitable owner of said premises, and that if the said supposed deed of trust mentioned in said bill of complaint shall be ad-

judged by this court to be a valid lien on said premises, then this respondent ought in equity to be allowed to redeem said premises from the lien of said trust-deed, and having so redeemed said premises, to hold the same in fee-simple, discharged from the lien of said deed of trust.

IDA WINTER BRINE,
By GEORGE J. BRINE,
Her Guardian ad litem.
FRANCIS A. RIDDLE,
Solicitor for Def't, Ida Winter Brine.

JAMES E. MONROE.
Of Counsel.

(Endorsed:) Filed Feb'y 27th, 1875. W'm H. Bradley, cl'k.

31 Afterwards, to wit, on the 2d day of March, A. D. 1875, said complainant, by its solicitors, filed in said clerk's office its replication to the answer of said defendant, Ida Winter Brine, in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of Ida Winter Brine.

In the circuit court of the United States, northern district of Illinois.

THE HARTFORD FIRE-INSURANCE COMPANY, compl'ts,
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine (minor), Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irwing Pearce, defendants.

The replication of said complainants to the answer of said Ida Winter Brine in said cause.

Said complainants, saving all exceptions to said answer, for replication thereto, say that they do and will aver and prove said bill to be true and sufficient to be answered unto, and the said answer to be untrue and insufficient to be replied unto, and they pray as they have heretofore in said bill prayed, &c.

PADDOCK & IDE,
Their Sol's.

(Endorsed:) Filed March 2d, 1875. W'm H. Bradley, cl'k.

32 Afterwards, to wit, on the 5th day of March, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT ET AL. } In chancery.

Now come the parties, by their solicitors, and upon motion of Ida Winter Brine for leave to file a cross-bill, it is ordered that the original bill herein and said cross-bill be referred to John I. Bennett, esq., to examine the same, and to report to the court with his findings thereon.

Afterwards, to wit, on the 15th day of March, A. D. 1875, said
33 defendant, J. Irving Pearce, by his solicitors, filed in said clerk's office his answer with exhibit thereto attached in said entitled cause, which said answer and exhibit are in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois. In chancery.

The several answers of J. Irving Pearce, one of the defendants in the bill of complaint of the Hartford Fire-Insurance Company, of Hartford, in the State of Connecticut, complainants, against George Bartalotte, Anna Bartalotte, George H. Barbier, Caroline Barbier, George J. Brine, Id' Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and this respondent, defendants.

This respondent reserving all right of exception to said bill of complaint, for answer thereto says that he believes the matters and things in said bill of complaint set forth are substantially true, but he has no personal knowledge of said matters and things, and leaves the complainant to make proof thereof.

And this respondent, further answering, admits that he has and claims an interest in the premises mentioned and described in said bill
34 of complaint, and the trust-deed therein referred to, and says that on or about the 20th day of February, A. D. 1874, Samuel J. Walker, and his wife, Amanda M. Walker, by their good and sufficient deed of conveyance, dated February 20th, 1874, sold, conveyed, and quit-claimed to this respondent the premises described in said bill of complaint and deed of trust.

That said deed of conveyance was duly acknowledged and delivered to this respondent, and was duly recorded in the recorder's office of Cook County, Illinois, on the 24th day of February, A. D. 1874, and recorded in book 134 of records, on page 445, a copy of which said deed of conveyance is hereto annexed, marked "Exhibit C."

And this respondent further answering says, that he holds the legal title to said premises by virtue of said deed of conveyance, and he is advised, and believes, that he is entitled upon the sale of said premises, under the decree of this court, and the payment to said complainant of the amount found to be due him, and secured on said premises, to have the balance realized from such sale after the payment of costs and expenses of sale, to be paid to him, and he hereby submits his rights in, and claims to, said premises, to the care and protection of this
35 court, prays that he may be permitted to become a purchaser at the sale of said premises, and the amount for which said premises shall be sold, shall, after the payment of the amount found to be due to said complainant, and the costs of said sale, *shall* be paid to this respondent.

All which this defendant is ready to aver, maintain, and prove, in such manner as this court may direct.

J. IRVING PEARCE,
By JOHN H. THOMPSON,
His Solicitor.

JOHN H. THOMPSON,
Solicitor for Defendant Pearce.

(Endorsed:) Filed March 15, 1875. Wm H. Bradley, cl'k.

36 EXHIBIT A.

This indenture, made this 14th day of February, in the year of our Lord one thousand eight hundred and seventy-four, between Samuel J. Walker, and Amanda M. Walker, his wife, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and J. Irving Pierce of the city of Chicago, in the county of Cook and State of Illinois, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one (1) dollar in hand, paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have remised, released, sold, conveyed and quit-claimed, and by these presents do remise, release sell, convey, and quit claim unto the said party of the second part, his hiers and assigns, forever, all the right, title, interest, claim, and demand, which said party of the first part has in and to the following described lot, piece, or parcel of land, situated in
37 the county of Cook, State of Illinois, and known and described as follows, to wit:

Beginning at a point on the east line of Ashland avenue one hundred (100) feet north of the northeast corner of Monroe street and said avenue; running thence north thirty-three (33) feet; thence east, on a line paral'el with the north line of said Monroe street, one hundred and fifty (150) feet, more or less, to an alley; thence south on the west line of said alley thirty-three (33) feet; thence west, on a line paral'el with said north line of Monroe street, one hundred and fifty (150) feet, more or less, to a place of beginning, said premises lying and being in block numbered six (6), in the canal trustees' subdivision of the west half (W. $\frac{1}{2}$), and the west half (W. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section seventeen (17), township thirty-nine (39) north, range fourteen (14) east, of the third (3rd) principal merid'an, in the city of Chicago, and county and State aforesaid:

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the
38 second part, his heirs and assigns forever.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

SAMUEL J. WALKER. [SEAL.]
AMAND. M. WALKER. [SEAL.]

STATE OF ILLINOIS,
County of Cook, ss:

I, Parke B. Chase, notary public for and residing in said county, in the State aforesaid, do hereby certify that Samuel J. Walker and Amanda M. Walker, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the
39 uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this twentieth (20) day of February, A. D. 1874.

[NOTARIAL SEAL.] PARKE B. CHASE,
Notary Public.

STATE OF ILL'S,
County of Cook, ss:

No. 152265.

Filed 24th day of February, A. D. 1874, at 1 o'c'k p. m. Book 134 of record, page 445. Mar. 2nd, 1874.

JAMES STEWART,
Recorder.

WM H. BRADLEY, *Clk.*

40 Afterwards, to wit, on the 24th day of March, A. D. 1875, John I. Bennett, esq., the special master in chancery to whom this cause was referred, filed in said clerk's office his report in said-entitled cause, which said report is in the words and figures following, to wit:

Report of John I. Bennett, special master.

United States circuit court, northern district of Illinois, March term, 1875. In chancery.

THE HARTFORD FIRE INSURANCE COMPANY
v.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, and J. Irving Pierce. } Report of special master.

The undersigned, to whom was referred for decision and report the question as to whether leave should be granted to Ida Winter Brine to file the cross bill heretofore presented to the court in said cause,
41 upon an application for leave to file the same, having considered the question and the arguments of counsel thereon, begs leave to report:

The original bill in this cause is filed to foreclose a trust-deed upon the property in question, executed by George Bartalotte and George H. Barbier and wives, March 15th, 1869, recorded May 25th, 1869, with the usual allegations of bills for foreclosure of mortgages.

In addition to the above-named mortgagors, Samuel J. Walker, George J. Brine, Ida Winter Brine, J. Irving Pearce, and Benjamin E. Gallup are made parties and alleged to have some interest in the prop-

erty, inferior and subordinate to that of the complainants, under the trust-deed.

The cross-bill, for the filing of which leave is asked of the court, alleges that defendants Bartalott and Barbier, after the execution of the deed of trust to the complainant, sought to be foreclosed, conveyed to defendant Walker; that Walker, Nov. 22nd, 1870, and after the said conveyance to him from the grantors in said trust-deed, and while he was thus the owner of the equity of redemption of the premises, made a written agreement with one Ida R. Brine for the sale of the premises, free of incumbrance, for the sum of $18,000, of which amount $5,000 were paid at the time of purchase, and the balance, after deduct-
42 ing the amount of the trust-deed in question, which was to be paid by said Ida R. Brine as a part of said purchase-money, was to be paid in one year; that immediately upon the execution of said agreement between said Walker and Brine, said Ida R. Brine went into possession of the property with Walker's consent, and held actual possession thereof until her death, which occurred in Oct., 1873, and that the complainant in the cross-bill, Ida Winter Brine, who is the sole heir at law of said Ida R. Brine, who died intestate, has continued in possession of said property, and now is in possession thereof, as equitable owner under said agreement.

That said Walker, on or about Feb'y 24th, 1874, wrongfully conveyed said property by quit claim deed, for the nominal consideration of one dollar, to said J. Irving Pearce; that within one year from the date of said agreement said Ida R. Brine tendered to said Walker the balance due on said agreement of purchase, and demanded a deed, and that she and complainant in the cross bill have at all times been ready and willing to comply with said agreement of purchase.

That Ida R. Brine and complainant in cross-bill have expended $4,000 in the improvement of said premises, and that complainant in cross-bill cannot safely redeem said premises from the lien of said deed of
43 trust until the question of her right to compel said Pearce to convey to her is determined by the court. A copy of the agreement is filed with the cross-bill, and it appears there are no forfeit clauses therein.

The prayer of the cross-bill is that Pearce and Walker be compelled to convey; that as to them the agreement be specifically performed; and that she be allowed to redeem said premises from said deed of trust, payment of whatever sum of money may be found by this court due thereon.

The cross-bill nowhere offers to pay the amount confessedly due until the determination of the issues in the case, including those under the cross-bill.

It thus appears on the face of the cross-bill that, as against the complainant in the original bill, the complainant in the cross-bill has no legal nor equitable right to postpone, delay, or defeat the foreclosure of the trust-deed. The purchase from Walker was made after recording of said trust-deed, and with the express understanding that the purchaser should pay the trust-deed as a part of the purchase-money of the property.

In order to compel a specific performance as against Walker, compliance with the agreement by payment or tender of this trust-deed should be shown. The insurance company ought not to be postponed or delayed in the collecting of the trust-deed, if it has become due and payable by its tenor, simply to allow the complainant in cross-bill to

determine her right to a specific performance, as against Walker and Pearce.

It is my opinion, therefore, that, as the cross-bill is now framed leave ought not to be granted to file it.

I will add, however, that in my opinion a cross-bill offering to pay complainant in the original bill, or bringing into court the amount confessedly due on the trust-deed, asking thereupon an assignment by or subrogation to the right of said complainant under the trust-deed, and also asking the same relief prayed in the present cross-bill as against said Pearce and Walker, should be allowed, but there should be a distinct offer to pay immediately the amount confessedly due on the trust-deed.

The subject-matter of this litigation is the mortgaged property, and not merely the foreclosure suit or the trust-deed being foreclosed.

If the allegations of the cross-bill are true, Pearce, under the conveyance from Walker, received while Ida W. Brine was in possession, under the agreement, took title subject to the rights of complainant in
45 the cross-bill, and should be compelled to convey, and a cross-bill I think would properly lie in this cause to obtain that relief. (2 Dan'l, ch. Pl. & Pr., 1548.)

The objection taken that the parties to the cross-bill other than the insurance company are residents of this State, and that therefore the court would not have jurisdiction as to the cross-bill, I do not regard as well taken. The cross-bill is an auxil*l*ary to or depend*a*ncy upon the original suit, and the court, having jurisdiction of the original bill and of the subject-matter of the cross-bill, takes jurisdiction of the cross-bill without regard to the jurisdictional facts appearing from the cross-bill, independ*a*ntly considered, and viewed as an independ*a*nt proceeding. (Railroad Company v. James, 6 Wal., 75.)

I would therefore find and recommend that the motion for leave to file the cross-bill as at present framed be disallowed.

JOHN I. BENNETT,
Special Master.

Fees, $25.

(Endorsed:) Filed March 24, 1875. W'm H. Bradley, cl'k.

46 Afterwards, to wit, on the 31st day of July, A. D. 1875, said defendant Ida Winter Brine, by her solicitors, filed in said clerk's office her exceptions to the report of John I. Bennett, esq., special master in chancery, to whom this cause referred for report, which said exceptions are in the words and figures following, to wit:

Exceptions of Ida Winter Brine to master's report.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States for the northern district of Illinois. In chancery.

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTE, ANNA BARTALOTE, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, and J. Irving Pearce.

Exceptions taken by the said Ida Winter Brine, a minor, by George J. Brine, her guardian ad litem, one of the defendants in the original bill of complaint named and complainant in the cross-bill of complaint, an application for leave to file which has been heretofore made in this court by the said Ida Winter Brine, to the report of John I. Bennett, esq., special master appointed by this court to decide and report as to whether said application ought to be allowed.

74 FIRST EXCEPTION.—For that the said special master hath in and by his said repo t certified as a reason why the application aforesaid should not be granted, that said cross-bill shows that the complainant in the cross-bill has no legal or equitable right to defeat or delay the foreclosure of the deed of trust mentioned in the original bill; because it appears the purchase from Walker was made after said deed of trust was recorded, and it was the "express understanding" that the purchaser would pay the deed of trust as a part of the purchase-money; and because, in order to compel a specific performance as against Walker, compliance with the agreement by payment or tender of the money due on the deed of trust should be shown; whereas the cross-bill shows that before the deed of trust became due, Walker wrongfully and fraudulently conveyed the premises in question to Pearce, and thus put it out of his power to perform his contract to convey; and the cross-bill also shows that up to the time when complainant in the cross-bill had notice of said wrongful conveyance by Walker, she and her ancestor, whose interest in the premises she inherited, had paid all interest which had become due on said deed of trust, the principal being not yet due, and had performed said contract of purchase made with Walker
48 in all things on her part to be performed, up to that time, and after said conveyance she repeatedly offered to complete said contract upon Walker's giving her a deed of conveyance of said premises.

And whereas, also, as the cross-bill shows perfect, equitable grounds for specifically performing the contract made by and between Walker and Ida R. Brine, and shows that by means of Pearce having wrongfully acquired the title to the premises, and having asserted the same adversely to the complainant in the cross-bill, she cannot, without putting her rights in peril, redeem from the deed of trust, it does not appear on the face of the cross-bill that the complainant therein has no legal or equitable right to postpone or delay the foreclosure, for in such case—and especially when the complainant is a minor asking relief—the court will not speed the foreclosure, but will delay the same until the rights of the owner of the equity of redemption are established.

SECOND EXCEPTION.—For that the said special master hath in and by his said report certified as a re ason why said cross-bill should not be filed, that the complainant therein hath not offered to pay immediately the amount confessedly due on said deed of trust, and that if she
49 should so do, she might demand an assignment by or subrogation to the rights of the complainant in the original bill; whereas in fact said cross-bill does not confess any particular sum to be due, but prays for an account of the sum claimed to be due.

And whereas, also, an offer to pay immediately without bringing the money into court and paying would be nugatory; and the complainant in the cross-bill as already stated cannot, in safety to her rights, and without irreparably imperiling the same, make such payment until her right to the equity of redemption is adjudged to her.

And whereas, also, the complainant in said cross-bill has no right whatever in law or equity, on the payment of said deed of trust, to demand

or ask, or have an assignment by, or subrogation to, the right of the complainant in the original bill.

Wherefore the said Ida Winter Brine, by her said guardian, George J. Brine, excepts to the said special master's reports, and humbly appeals therefrom to the judgement of this honorable court.

IDA WINTER BRINE,
By GEORGE J. BRINE,
Her Guardian ad litem.

FRANCES RIDDLE,
Sol. for Ida Winter Brine.

(Endorsed:) Filed July 31st, '75. W. H. Bradley, cl'k.

50 Afterwards, to wit, on the 23d day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, GEORGE H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce. } In chancery.

This day this cause comes on to be heard upon the exceptions of said defendant Ida Winter Brine to the report of John I. Bennett, esq., special master in this cause, upon the reference of the application of said Ida Winter Brine for leave to file her cross-bill in this cause against said complainants and her co-defendants in this cause, and said complainants come, by their counsel, and also comes the guardian ad litem of said applicant, and the court having considered the matters of said exceptions, it is ordered and adjudged by the court that such exceptions be overruled and such application for leave to file such cross-bill be and the same is hereby denied.

And it appearing to the court that due process of subpœna in
51 chancery in this cause has been served personally upon each of said defendants George J. Brine and Samuel J. Walker, more than twenty days prior to the first Monday of February, A. D. 1875, and that said defendants George J. Brine and Benjamin G. Gallup have heretofore, to wit, the said Gallup on the eighth day of January, A. D. 1875, and said George J. Brine on the thirtieth day of January, 1875, severally entered and filed their appearances in this case, but that none of said defendants, George J. Brine, Samuel J. Walker, and Benjamin E. Gallup, has made answer or further appearance in this cause, it is, on motion of said complainant's counsel, ordered and adjudged that said defendants George J. Brine, Samuel J. Walker, and Benjamin E. Gallup, trustee, and each of them, come into court here and severally plead, answer, or demur to the said complainant's bill of complaint, and said defendants last named being each one three times solemnly called to come into court here and so plead, answer, or demur to said complainant's bill of complaint, come not, but they and each of them make default in that behalf, and thereupon it is, on motion of said complainant's counsel, ordered, adjudged, and decreed by the court that as to them, and each of them, the said last-named defendants, George J. Brine, Samuel J. Walker, and

Benjamin E. Gallup, trustee, the said bill of complaint of said
52 complainants be held and taken as and for confessed.

And, on motion of said complainant's counsel, it is further ordered and adjudged by the court that the above cause be referred, by consent of counsel, to John I. Bennett, esq., as special master in chancery of this court, to take and report proof herein to the court touching the matters and things stated in said bill of complaint, and the amount, if any, due upon the notes and deed of trust in said bill of complaint.

53 Afterwards, to wit, on the 24th day of April, A. D. 1875, said complainant, by its solicitors, filed in said clerk's office its replication to the answer of said defendant J. Irving Pearce, which said replication is in the words and figures following, to wit:

Replication to answer of J. Irving Pearce.

United States circuit court, northern district of Illinois.

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEO. BARTALOTT, ANNA BARTALOTT, GEO. H. Barbier, Caroline Barbier, Geo. J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, J. I. Pearce.

The replication of the Hartford Fire-Insurance Company, the plaintiffs, to the answer of J. Irving Pearce, one of the defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this defendant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied
54 unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

PADDOCK & IDE,
Compl't's Sol'rs.

(Endorsed:) Filed April 24, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 27th day of May, A. D. 1875, said John I. Bennett, esq., special master in chancery, to whom this cause was referred, filed in said clerk's office his report in said-entitled cause, which said report, together with the exhibits thereto attached, is in the words and figures following, to wit:

55 *Master's report.*

United States circuit court, northern district of Illinois. In chancery, ss.

THE HARTFORD FIRE INSURANCE CO.
vs.
GEORGE BARTALOTTE, GEORGE H. BARBIER, et al. } Foreclose mortgage.

The undersigned, special master in chancery, appointed by the court

to take and report the evidence in the above cause, together with his findings thereon, respectfully reports to the court that, in pursuance of notice, the several parties to this cause, Mess'rs Paddock and Ide appearing for said complainant, Mess'rs Bishop and Thompson for said defendant J. Irving Pearce, and F. A. Riddle for defendants Ida Winter Brine and George J. Brine (the court is in this connection referred to the evidence herewith filed and made a part of this report).

From the foregoing evidence I find:

First. That the said trust-deed mentioned in the bill of complaint as having been executed by defendants Bartalott and Barbier
56 and wives to defendants, Benjamin E. Gallup, as trustee, March 18th, 1869, and recorded May 25th, 1869, securing a principal-note of $7,000 and interest coupons of same date as trust-deed, as described in said bill, is a first and valid lien on the real estate described in said trust-deed and bill, and that there is now due and unpaid upon said notes, coupon, and trust-deed the sum of $8,170.24 at the date of this report, for which sum the said complainants are entitled to a decree of foreclosure upon said real estate as against all of said defendants.

Second. I find that on the 22nd day of November, 1870, defendants Samuel J. Walker, being the owner of said real estate, subject to the said trust-deed to Gallup, sold and agreed to convey to Ida R. Brine, wife of defendant Geo. J. Brine, said real estate, for the sum of $18,000, of which amount there was paid to said Walker upon said purchase the sum of $5,150, and the said trust-deed to Gallup for the further sum of $7,118.96 was assumed by said Ida R. Brine, leaving the balance due to Walker upon said contract of $5,731.04 to be paid to said Walker within one year, with interest at 8%; that said contract con-
57 tained no forfeit clause, and is still in force. That said Walker, on the 20th day of February, 1874, conveyed said real estate to defendant J. Irving Pearce as security for a special indebtedness to the Third National Bank of Chicago, of $10,000. That said Ida R. Brine entered into possession of said property at or about the said date of her purchase, and died intestate in October, 1873, leaving defendant Ida Winter Brine as her sole heir at law; that the only interest which said defendant Pearce has in said property is as trustee of Walker and said bank, for security of the payment of the balance due upon said agreement in writing. That the amount now due upon said agreement in writing is the sum of $7,794.21, and that upon payment of said amount to said Pearce, said Ida Winter Brine is entitled, as against said Pearce, to a conveyance of the interest and title of said Pearce in said real estate.

Third. After duly considering the equities of the parties, I find that out of the proceeds of the sale of said real estate payments should be made in the following order: first, the amount of complainant's decree, interest, and cost; second, to defendant J. Irving Pearce the above amount due him as such trustee, with interest; and, third, the
58 residue, if any, to said defendant Ida Winter Brine; and I recommend decree accordingly.

Chicago, May 23rd, 1875.

JOHN J. BENNETT.
Special Master.

Master's fees, $100.00.

(Endorsed:) Filed May 27th, 1875. W'm H. Bradley, cl'k.

The depositions of Henry Reike, Francis B. Peabody, George J.
59 Brine, J. Irving Walker, Samuel J. Walker, and N. Q. Van Every, attached to master's report, and therein referred to, are in the words and figures following, to wit:

Counsel for complainant offered in evidence a deed of trust, bearing March 15th, 1869, between George Bartalott and Anna, his wife, and George H. Barbeir and Caroline, his wife, parties of the first part, and Benjamin E. Gallup, party of the second part, as security for payment, by said Bartalott and Barbier, of their note in favor of the Hartford Fire-Insurance Company in the amount of $7,000.00, payable five years after date; said deed of trust describing the premises named in said bill, which deed of trust is marked "Exhibit A," exhibited on this hearing, and herewith filed. The certificate of record therein is as follows:

STATE OF ILLINOIS,
Cook County, ss:

130.60. Filed for record May 25th, 1869, at 4 p. m. Recorded in book 506 of deeds, page 408.

(Signed) NORMAN T. GASSETTE,
Recorder.

Complainant next introduced as a witness HENRY REIKE. Witness, having been duly sworn by clerk of said circuit court, on this
60 hearing, to testify the *th*ruth, the whole truth, and nothing but the truth, so far as interrogated, says:

Q. What is your name, age, and occupation, and residence?

A. My name is Henry Reike; I reside in Chicago; I am bookkeeper and cashier for Gallup and Peabody.

Q. Who are Gallup and Peabody?

A. They are negotiators of mortgages, and originally negotiated this loan.

Counsel for complainant here offers in evidence the principal-note of said Bartalott and Barbier described in said deed of trust, dated March 15th, 1869, calling for said $7,000 with interest at 9 per cent. per annum, payable half yearly, said paper being payable five years after date.

(Counsel for defendant, Ida Winter Brine, objected to the introduction of principal-note.)

Counsel for complainant offered in connection with the note the coupon from it, as referred to in said principal note and deed of trust, purporting to be for a lien interest on said note, and said principal-note falling due on the 15th of March, 1874, in the sum of $7,000, purporting to be signed by said Bartalott and Barbier, which principal-note and coupon are made exhibits herein, and marked "Exhibit B."

(Counsel for defendant objected to the introduction of the coupon as well as the note.)

61 Q. Have you computed the interest upon this principal-note and coupon?

A. Yes, sir; I have.

Q. Please state it.

A. Amount due March 15th, 1874, $7,000; interest on the same from March 15th, 1874, to April 23rd, 1875, 1 year, 1 month, and 8 days, at 9 per cent. per annum, $696.50; coupon interest of note, due on March 15th, 1874, $315.00; interest on same, at 10 per cent., from March 15th, 1874, to April 23rd, 1875, $34.82. November 3rd, 1874, insurance pre-

miums under said policies, $45.00; interest on the same at 10 per cent. to April 23rd, $2.30. Total amount due on April 23rd, 1875, $8,693.45.

Q. Did you know of this insurance?

A. Yes, sir.

Q. What do you know as to the signatures of this principal note, as to the handwriting?

A. I know it is that of George Bartalott.

Q. And of M'r Barbier, do you know?

A. I cannot be certain, for I never saw his signature.

(Counsel for defendant, Ida Winter Brine, objected to the evidence of the sum paid for insurance, unless upon evidence that the parties of the first part in the deed of trust exhibited in evidence have failed to keep the premises therein described insured, and further, unless upon proof that the party of the second part has insured said premises and paid the premium therefor.)

62 Q. Do you know how much insurance there was on the premises?

A. No, sir.

HENRY RIEKE.

And thereupon FRANCIS B. PEABODY, having been duly sworn by the clerk of the circuit court to testify, in answer to all interrogatories, the truth, the whole truth, and nothing but the truth, says:

Q. What is your name and occupation?

A. My name is Francis B. Peabody; my business, negotiator of loans on real-estate securities.

Q. What, if anything, have you to do with the taking of paper in this case?

A. I am and was in March, 1869, a partner in the firm of Gallup and Peabody. In that month our firm negotiated a loan of $7,000.00 to Bartalott and Barbier, made to them by the Hartford Fire-Insurance Co., which was secured to be paid by the trust deed and note which are made exhibits in this case.

Q. Do you know the handwriting of said George Bartalott and Barbier? If so, state how you became acquainted with it, and state whether the signatures to these notes are genuine.

A. At the time referred to at the negotiating of these loans we negotiated for Bartalott and Barbier some dozen or twenty loans,
63 amounting in all to a large sum. While this was being done, M'r Bartalott and M'r Barbier were in our office in relation to these loans many times. As to the signatures to these papers, my recollection is not positive that I saw them signed, but I have seen them write their names many times, and have no doubt of the genuineness of the signatures referred to, and marked "Exhibit B," and think that I saw them executed in person.

Q. State what paper this is that we have shown you.

A. A policy in the North British and Mercantile under date of March 15th, issued to Benjamin Gallup for the sum of $6,000.00 upon a three-story brick and stone front dwelling-house, situated No. 84 Ashland avenue, Chicago, Illinois.

Q. Are these premises the ones in controversy in this case?

A. No. 84 Ashland avenue, as I am informed and believe, is the same premises described in the deed of trust marked in this case "Exhibit A."

Q. State what connection your firm had with the taking out of this policy, and for whom it was taken out.

A. This policy is one of the security papers held as collateral on this

original loan of $7,000.00, evidenced by the trust-deed aforesaid. It was taken out for the protection, and as security for the loan in
64 *in* the name of M'r Gallop, as trustee, under a special provision contained in the trust-deed aforesaid.

Q. Did you know of any other insurance as collateral on these loans?

A. I do not know of any other insurance having existed on the loans.

Cross ex. by sol'. for defendant:

Q. Do you know whether Bartalott and Barbier insured this property?

A. I can only state from general recollection. I don't know as I can state whether they delivered policy of insurance as collateral at the moment of the execution of the insurance papers in 1869, but have no doubt that they did deliver such policy.

Q. Do you know whether any policies were taken out by Bartalott and Barbier that were not in force at the time this policy was executed?

A. I do not know if there was any not in force, but have no doubt they had expired.

Q. What is the ground of your information?

A. I presume that our custom at the date of this loan was as it has been for a long time, to require at the time of the loan a policy to be issued running for the term of the loan where the loan is made upon property upon which the insurance company will write term policy, and as this loan was made under date of March, 1869, I presume that
65 any policy taken out at that time as collateral upon the loan would have expired before the policy now shown to me was issued.

Q. What do you know about the execution of these policies and payment of the premium named in the same?

A. I have not any personal knowledge of the execution of the policy, and I cannot tell without referring to our books of account in regard to the payment of the premium.

FRANCIS B. PEABODY.

Counsel for complainant admits that subsequent to the recording of the deed of trust referred to in the bill of complainant in this case, the said defendants Bartalott and Barbier, with their respective wives, conveyed by deed of quitclaim the premises in controversy, with other premises, to said defendant Samuel J. Walker, which quitclaim deed, dated Oct. 12th, 1870, as appears by complainant's recited abstract of title, was based upon a consideration of $35,000.00, and was recorded Oct. 14th, 1870, in book 574, at page 508.

Direct examination by counsel for complainant:

GEORGE J. BRINE, having been duly sworn by clerk of circuit court to testify the truth, the whole truth, and nothing but the truth, in answer to all or any interrogatories, says:

66 Q. What is your name?

A. George J. Brine.

Q. What is your age?

A. I am 35 years old

Q. Where do you reside?

A. I reside at 84 Ashland avenue, Chicago.

Q. How long have you lived in Chicago?

A. About 16 years; I came here in the year 1859.

Q. Where do you live, as to street and number?

A. At 84 Ashland avenue.

Q. When were you married?

A. In October, 1866.
Q. To whom?
A. Ida R. Dewey.
Q. You may state if your wife was living on the 22nd day of Nov., 1870.
A. She was.
Q. State whether, as her agent at that time, you made that contract for the purchase of or in reference to the property described in that contract.
A. I did.
(Contract shown to witness, dated Nov. 22nd, 1870, which is marked "Exhibit D.")
Q. What was the amount of money paid to Walker at that time under this contract?
A. $5,000.00; a certified check on the 5th National Bank.
Q. How soon after the making of this contract did you enter into possession of this property, along with your wife?
A. The next day, if taking the key is possession. We moved in within a week or two.

67 Q. Is your wife now living?
A. No.

Q. State when her death took place.
A. Three years ago.
Q. In October of 1873?
A. Yes, sir.
Q. Where were you living at the time of her death?
A. At 84 Ashland avenue.
Q. Had she resided in that house all of the time continually?
A. She had.
Q. Did she leave any heirs?
A. One, I; born on the 10th of Sept., 1873.
Q. Is that child one of the defendants in this case?
A. I understand so.
Q. By what name?
A. Ida Winter Brine.
Q. Were there any other children?
A. No, sir.
Q. Is she occupying this house now?
A. She is.
Q. After the making of this contract, did you, as agent for Ida R. Brine, or as father of Ida Winter Brine, or both, or either, ever urge the fulfillment of this contract to M'r Walker?
A. I did.
Q. Did you ever offer to pay him the money upon the delivery of the deed?
A. I did.

68 Q. You may state how often, and under what circumstances, these offers were made.

A. Within a year of the making of the contract I met M'r Walker on the corner of Dearborn and Washington st's, and told him I was ready to fulfill my part of the contract, and that when the deed was made out I would pay the money. It ran along for over six months, when I again applied to M'r Walker for the deed. He told me he would make it out, but he never did so. About a year after, I don't think it was more than that, I again applied to him, and he promised for the third time to make out the deed. The fourth time was subsequent to the panic of

1873. I then told him I was ready to pay the money, standing by his gate, in front of his house, on Ashland avenue.

Q. During the time spoken of did you go to his office to request him to make out the deed?

A. I did four or five times, but had to go to his house, not finding him in. I met M'r Walker but not M'r Walker.

Q. During the time that your wife and you have been in occupation of this property, have you paid any taxes?

A. I have.

Q. To what amount?

69 A. I paid M'r Henry Walker $130, which was to be applied on the taxes. It was paid near the engine-house on the corner of the alley leading into La Salle s't. I think it was $130.00 but can't be sure of the exact sum.

Q. After the making of this contract, and after taking possession of this property, when did you learn that Walker had conveyed the property to M'r Pierce, one of the defendants in this suit?

A. I don't remember exactly; I cannot tell; somewhere in the last of November, I think.

Q. Were you ready at that time to fulfill your part of the contract?

A. I was and am now, and I so told M'r Pierce.

Q. Have you ever made any improvements on this property?

A. I have.

Q. To what extent?

A. Between $1,200 to $1,400.

Q. In what condition was the house at the time you or your wife took possession?

A. In condition to need repairs prior to being occupied.

Q. And if, prior to occupying, you made such repairs, at whose expense were they to be made?

A. It was at M'r Walker's; it was a part of the agreement.

(Counsel for M'r Pierce objected to this question.)

70 Q. You don't mean to say it was a part of the written agreement?

A. No, sir; it was a part of the verbal agreement, and was to be deducted from payment.

(Counsel for M'r Pierce objected to answer.)

Q. Did Walker ever, at any time, tender a deed of conveyance to you or your wife, in her life-time?

A. No, sir; never.

Q. Did he ever make you an abstract of title for examination?

A. No, sir; never.

Q. Did he ever refuse to comply with his contract?

A. Yes, sir.

Q. For what reason?

A. For no reason—I know of no reason.

Q. He never alleged, as a reason for not coming up to his contract, any fault of yours, or of your wife's?

A. No, sir; never. He never could; for he never sent a bill or sent for money that was not paid him.

Q. Do you remember having a conversation with Walker as to the reason of his making the conveyance to Pierce?

(Question objected to by counsel for M'r Pierce.)

A. I went to M'r Walker's office within two months after the panic in 1873, in Nov. or Dec.; I told him that I was ready to fulfil my part of

the contract, and asked him for a deed. He told me that the deed
71 should be made out, but that he had put the property into M'r Pierce's hands in order to protect my interests, and that he would see M'r Pierce and have the matter straightened out. It was subsequent to the panic; but it might have been in January or February.

Q. Was it subsequent to the time when you learned that the conveyance had been made to M'r Pierce?

A. It was. I learned that from M'r Gallup.

Q. Did you pay any interest on any loans or mortgages or deeds of trust which were upon the property before the time you learned of the conveyance to M'r Pierce?

A. I did.

Q. You paid interest from the time you took possession up to the time you learned that the property had been conveyance' to Pierce?

A. I did. $630.00 interest for past four years; I think that was the sum; everything that was due.

Cross-examination by M'r Thompson, solicitor for defendant Pierce:

Q. In whose handwriting is this paper?

A. Samuel J. Walker.

Q. Was it written in your presence?

A. It was.

Q. Where?

A. At M'r Walker's office, over Union National Bank, prior to the fire.

Q. Was it at the time of the date of this paper?

A. It was.

72 Q. By whom was the $5,000 paid?

A. Ida R. Brine.

Q. Was she present at M'r Walker's office at that time?

A. She was not, sir.

Q. Did you see the money paid to M'r Walker?

A. I did.

Q. When were the words interlined, "Ida R. Brine, wife of."

A. Before the contract was completed or signed.

Q. From whom did you receive the $5,000.00?

A. From the 5th National Bank; that is, they certified a check.

Q. It was paid by certified check?

A. Yes, sir.

Q. Who drew the check?

A. I did.

Q. Have you, or did your wife have, any other written agreement with Walker, in reference to this paper? (Shown.)

A. No, sir.

Q. Do you remember the interlining of the name of your wife before the execution of this paper?

A. I do, sir.

Q. By whom was it done?

A. By M'r Walker.

Q. Was it done with the same pen and ink with which the rest of the paper is drawn?

A. It was; and within three minutes of the time that it was made out.

Q. Where was your wife at this time?

A. At 23 Bishop Court.

73 Q. Were you living in the house at that time?

A. No, sir, I was not; we were living at 23 Bishop Court. We moved in about two weeks; possibly three.

Q. How came the name of your wife to be written after and so written?

A. M'r Walker made a mistake, found it out himself, and corrected it. I had made the check and stood near him as he was writing. He corrected it before finishing the contract.

Direct ex. resumed by M'r Riddle, counsel for complainant:

Q. Were you in solvent circumstances at the time the contract was made with Walker?

A. I was.

Q. For what purpose did you purchase the property?

A. For a homestead.

Cross-examination resumed:

Q. Was the $5,000.00 paid on that check your money?

A. It was my money.

GEORGE J. BRINE.

Complainant next introduced J. IRVING PIERCE as witness. Witness being duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to all interrogatories, testified as follows:

74 Q. What is your name, place of residence, and occupation?

A. J. Irving Pearce; my residence, Chicago; my occupation, I am president of 3rd National Bank.

Q. Look at this deed dated February 20th, 1874, made by Samuel J. Walker and his wife to J. I. Pearce, and entered for record in recorder's office February 24th, 1874, and state when this deed was delivered to you.

A. At that time: that of the date.

(Deed shown and marked "Exhibit E.")

Q. State if, at the time of the delivery of the deed, you had any knowledge of any claim on the premises by M'r's Brine or her heirs.

A. I did not.

(Question objected to.)

Q. Did any one on behalf of Ida Winter Brine or M'r's Brine ever call upon you in reference to this property?

A. They did call upon me about the time it was advertised for sale. M'r Brine called and asked me to bid it in.

Q. What sale do you refer to?

A. For the mortgage on it due about that time for about $7,000.00; I don't remember the exact amount.

Q. Did any one ever offer to pay you any money due on these premises under contract of sale, made by Walker to M'r's Brine?

A. No, sir.

75 Cross-examination by M'r Riddle:

Q. You say, M'r Pearce, you are president of the 3rd National Bank?

A. Yes, sir.

Q. When this conveyance was made by M'r Walker, what was the consideration for conveyance?

A. The consideration was for past due indebtedness, much greater than the property is worth.

Q. Indebtedness of your own?

A. To 3rd National Bank.

Q. To the 3rd National Bank?

A. Yes, sir.

Q. You did not hold the property for your own?

A. For the bank.
Q. What was the indebtedness of Walker to the bank at this time?
A. I don't wish to answer that question.
Q. I would like to know.
A. Above $50,000.00.
Q. I would like to know the exact amount.
A. I could not tell exact amount.
(Objection to this answer, and witness refused to answer further.)
Q. Was all this indebtedness secured?
A. All this indebtedness?
Q. Was it secured?
A. Yes, sir; or parts of the indebtedness.
Q. How much of it?
A. That is a very hard question to answer as to how much *much*;
76 it depends on facts on which I am not competent to answer.
Q. Could you state the amount you had?
A. No.
Q. Has the bank a list?
A. Yes.
Q. Cannot you produce that?
A. I could.
Q. I wish you would do so. I want to know what the indebtedness of Walker was to the bank at that time.
(Objected to.)
Q. What did you understand the property to be worth?
A. I did not know; but I think I understood it to be worth about $8,000 or $10,000.00 above liabilities.
Q. Did you ever tell any one you understood it was worth $10,000.00?
A. I don't think I did.
Q. Did you tell M'r Brine the bank took it for $10,000?
A. No, sir; I think I did say I understood it was worth about that.
Q. Did you not say something to M'r Brine about a special indebtedness, for which this was taken as security?
A. I don't think I did.

Witness Pearce being recalled, states:

The deed was made to me by M'r Walker to secure a particular loan of $10,000.00 from the 3rd National Bank. I took it because I
77 supposed the money would be paid on it, and the bank would realize on it to that amount. I claim the amount due upon the contract between Brine and Walker, at the time of the deed to me, and the interest on it. The general indebtedness of M'r Walker to the bank has nothing to do with it, and that is the reason I decline to answer on that subject.

J. IRVING PEARCE.

78 The defendant introduced as witness on this behalf SAMUEL J. WALKER. This witness, being duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to all interrogatories, testified as follows:

Q. What is your name and residence?
A. Samuel J. Walker; my residence is Chicago.
Q. Do you know George J. Brine?
A. I do.
Q. Did any one, on behalf of M'r's Brine or her heirs, ever tender you any money on the contract for sale of premises referred to in bill in this suit?

(Objected to.)

A. I think M'r Brine did tell me he was ready to pay some money on account of that contract, but he never made any tender of it.

Q. Did you ever make any other contract with M'r's Brine in relation to the premises, other than the original written contract for the sale, signed by you?

A. Not to my knowledge.

Q. When did M'r Brine speak to you about the payment of money?

A. Well, I can't remember the exact time; within the last two years.

Q. Did he ever call upon you and demand the deed of the premises, on behalf of M'r's Brine or her heirs?

79 A. The delivery of the deed?

Q. Did you make out the deed?

A. He did call upon me about the time that Gallup and Peabody were advertising, in regard to a settlement, and I understood he was ready to pay, on getting a title to property, but I think it was after M'r's Brine's death.

Q. Did he make any excuse for not paying the money?

A. He said something about it belonging to her. I don't recollect just what.

Q. Do you remember any straight and fair offer of money down prior to the time the property was conveyed to M'r Pierce?

A. I never had an offer of money down.

(The witness is shown contract, which is marked "Exhibit D.")

Q. Did you make that contract?

A. Yes.

Q. Is that your handwriting?

A. It is.

Q. All of it?

A. Yes.

Q. It was made on the day on which the contract appears to be dated, was it?

A. I presume it was.

Q. How soon after that did M'r and M'r's Brine take possession of the property?

A. I don't remember; it was pretty soon after.

80 Q. Did you ever tender M'r's or M'r Brine a deed of this property?

A. No.

Cross-examined by M'r Riddle:

Q. Did you ever have a deed to this property made out?

A. Not as I remember.

Q. Did you ever have an abstract?

A. I don't remember. I think the title was examined.

Q. You never offered either of them the abstract, did you?

A. After they demanded it, I told him he could have one to examine when he desired to close the matter.

Q. After the making of this contract, did not M'r Brine call upon you at different times and say that he was ready to make payment as soon as the deed to the property was made out?

A. I don't think he ever made a definite offer of money. I think I called upon him, and he said he was ready.

Q. Did he appoint a time after the panic of 1873?

A. I certainly do not think he offered me money at that time. I was in need of money and should have taken it.

Q. Did M'r Brine go to you, about the time of the panic of 1873, and say that on recieving the deed he was ready to pay?

81 A. I understood that some time in the early part of 1873 he was ready to pay.

Q. What did you tell him at that time?

A. I told him the title could be conveyed to him on the payment of the money, subject to all encumbrances.

Q. When did you make conveyance of this property to M'r Pearce?

A. It seems to have been in February, in 1874. I think it was after that that M'r Brine came to me and said he wanted to pay me.

Q. Did he offer to pay you at once?

A. I am convinced he did not offer me money, because I should have taken it.

Q. For what purpose did you make conveyance to M'r Pierce, defendant in this case?

A. I conveyed it as security upon indebtedness.

Q. As general security upon general indebtedness?

A. I think I intended it for a ten thousand dollar ($10,000.00) indebtedness.

Q. Was there anything said to M'r Pearce about what it was intended to secure?

A. I may not; but it was intended to secure the $10,000.

Q. Did you owe M'r Pearce anything?

A. This was to secure the bank.

Q. How much money did you owe the bank at that time?

(Objected to.)

82 A. I don't remember what I owed the bank at that time, except the $10,000.00 that this was intended to secure. This was to secure a special $10,000 loan.

Q. Can you remember any other amount that you owed the bank at the time?

A. I cannot remember any liabilities to the bank.

Q. Have you any means of ascertaining?

A. Yes, sir.

Q. What are they?

(Objected to.)

A. I can ascertain my liabilities by examining my books, with a statement from the bank as to the settlements of other interested parties.

Q. How long would that take you?

A. It would not take long, I suppose.

Q. Did you have any other security in the bank at that time?

(Objected to.)

A. I can ascertain by examination. As I say, part of my liabilities were held by the bank as collateral for other parties.

Q. Do you know what your liability to the 3rd National Bank is now?

A. I do not.

Q. What do you think it is?

(Objected to.)

A. I could not tell without examination. I am mixed up with other parties.

Q. Did you tell M'r Brine that you conveyed the property to M'r Pierce to protect him against any judgment that might be rendered against you?

83 A. I told M'r Brine that I conveyed the property as security, and also to protect him against judgment. I wished to protect them both.

Q. How much do you claim they owe you on the property?

A. I claim that they owed me the difference between the $5,000 paid and the seven or eight thousand dollars due on the property, and the $18,000 agreed to be paid for it, as per contract, and the interest on the difference; also any interest, if any paid by me, on the original mortgage or incumbrance held by Mess'rs Gallop and Peabody since the date of the sale to M'r's Brine subject or less any payment of taxes or interest, if any paid by Brine, that should have been paid by me before the sale.

Q. Did M'r Brine ever make any improvements on that house?

A. It may have been; but I don't think so.

Q. Did you at the time they took it say that you would pay for any repairs they might make?

A. Don't remember that I did.

Question. Did they repair the house before moving into it?

A. I don't remember what they did to the house. I presume if any improvements were made before I sold it, I paid for them. I don't remember about it.

Q. Did you ever have any conversation with M'r Brine about repairs made on the house after you made contract for sale?

A. I don't remember. Don't know why I should.

84 Q. Did you ever pay him any money on account of repairs made on the house?

A. I don't remember that I did.

Q. Did you notify them in any way that you were about to convey the property to M'r Pearce?

A. Not to my knowledge.

Q. You never demanded of M'r Brine the payment of the money or the fulfilment of the contract?

A. I think I spoke to him several times about the matter, asking him when he wanted to pay me.

Q. Did you owe the 3rd National Bank at that time?

A. I did.

Q. How much?

A. As I said before, I could not give the exact amount, as I was mixed up with other parties.

Q. Was there any other security for the $10,000?

A. Yes, sir.

Q. How much of it?

A. Well, there were some bonds, which secured some thousand dollars of it, or fifteen hundred. They were railroad bonds.

Q. Were the bonds secured by any mortgage or trust deed;

A. Yes; they are mortgage bonds.

Q. Who has that security now?

A. The bank.

Q. What is it worth?

(Objected to.)

85 A. I suppose they are worth some 20 or 25. I don't know as they could be sold for that now.

Q. What were they worth when you gave them to the bank?

A. I don't know what they were worth at that time. I have known them to be quoted at 75 and 80.

Q. How did you come by indebtedness to the bank?

A. Money borrowed.

Q. How did you borrow it?

A. I gave them a memorandum check, or note, with these bonds as collateral.

Q. Has any part of this money been paid?

A. Not to my knowledge. No, sir.

Q. How did you come to secure this indebtedness by this particular property?

A. From the fact that I expected to receive some money on this property soon?

Q. Did M'r Brine ever offer to pay this money and tell you that he was ready to do so as early as the winter of 1871?

A. I think he said something about soon being ready to fulfil the contract, but I never understood him to offer me money at any particular time.

Q. Are you not apt to put a person off, and tell them that you will attend to it in a few days?

A. Not when I am getting money. I may be slow about other things, but not about that.

86 Do you know what amount of security of yours the 3rd National Bank holds now?

(Objected to.)

A. I cannot tell, without making examinations.

Q. Do they hold any security as collateral, or upon indebtedness that you owe to the bank?

A. They hold some security on special notes of mine.

Q. Do they hold any of this as security upon any indebtedness or indebtednesses that you owe to the bank?

A. They hold some little security for interest which is due on notes of mine.

Q. How can you remember so well about this when you could not remember how much you owed the bank?

A. This was a special agreement between the cashier and myself.

Q. Did you at the time of the conveying of that property to M'r Pierce convey any other property to him?

A. No.

Q. Did you before that time?

A. Yes.

Q. Did you once, between the date of this contract, in 1870, and the conveyance to M'r Pierce?

A. Yes, sir.

Q. For what purpose?

A. To secure a certain indebtedness, between myself and other parties.

87 Q. One past due?

A. Not to my knowledge.

Q. It came due after you made the conveyance of property to M'r Pierce?

A. Yes, I think so—some time afterwards. It is, perhaps, proper for me to state that the object of my conveyance of the Brine property to M'r Pierce was to transfer merely my equity on the amount due me from M'r's Brine on the property, to wit, the difference between $18,000 sold for as per contract with the proper interest due thereon, and the $5,000 paid, with the $7,000 encumbrance held through Mess'rs Galop and Peabody secured on the property, and upon reflection I think I agreed to allow M'r Brine the cost or privelege of putting in a bow-window, similar to the one in M. D. Buchanan's house in south end of the block, between Monroe and Adams streets, the cost of which I think was understood to be not over $100 or $150; in addition to which, I was to pay for some improvements in or about the cellar, which I think, and am quite

certain, I paid for, but do not remember of paying on account of bow-window.

(Signature of witness waived by the parties.)

88 U. O. VAN ENERY, a witness on behalf of the complainant in this case, having been duly sworn by the clerk of said circuit court to testify in this cause the truth, the whole truth, and nothing but the truth, so far as interrogated, deposes and says:

Q. What is your name, place of residence, and occupation?

A. My name is U. O. Van Enery. My residence Chicago. My occupation, clerk for Gallup and Peabody, having in charge their insurance business, acting for them on behalf of complainant in this cause. I have affected insurance upon the premises occupied by M'r's Brine, in controversy in this case, under a mortgage or deed of trust, in controversy, for the amount of $6,000 in the German and American Insurance Company of New York at a cost of $30,000. This amount is additional to the items before testified to on behalf of complainant in this case.

The vouchers for such insurance is herewith submitted, marked "F."

W. O. VAN ENERY.

(Endorsed:) Filed May 27th, 1875. W'm H. Bradley, cl'k.

89 Exhibits referred to in the master's report are in the words and figures following, to wit:

This indenture, made this fifteenth day of March (15), in the year of our Lord one thousand eight hundred and sixty-nine (A. D. 1869), between George Bartolott and Anna, his wife, of the city of Philadelphia, County of Philadelphia, and State of Pennsylvania, and George H. Barbier and Caroline, his wife, of the city of Chicago, County of Cook, and State of Illinois, party of the first part, and Benjamin E. Gallup, of Chicago, aforesaid, party to the second part, witnesseth:

Whereas the said George Bartolott and George H. Barbier are jointly and severally justly indebted unto the Hartford Fire Insurance Company in the sum of seven thousand ($7,000 00) dollars, lawful money of the United States of America, secured to be paid by a certain joint and several principal promissory note, numbered 1, of the said George Bartolott and George H. Barbier, bearing even date herewith, payable to the order of the said the Hartford Fire Insurance Company,

90 in and by which said principal note they jointly and severally promise to pay to the order of the Hartford Fire Insurance Company the principal sum of seven thousand ($7,000) dollars, five (5) years after date thereof, with interest thereon at the rate of nine (9) per cent. per annum, payable half yearly, on the fifteenth day (15) of September and of March in each year, until said principal sum is fully paid, and both principal and interest payable at the office of the Hartford Fire Insurance Company, in Hartford, Connecticut, which said several installments of interest aforesaid, for said period of five (5) years, are further evidenced by ten (10) interest notes or coupons, of even date herewith, for the sum of three hundred and fifteen (315) dollars each, in and by which said principal note it is agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place when and where the same becomes due and payable as aforesaid, and such default shall continue thirty (30) days after such installment becomes due and payable as aforesaid, then, at the

(Five dollar revenue stamp, canceled.)

(Two dollar revenue stamp, canceled.)

election of the legal holder of said principal note, and the said principal sum of seven thousand (7,000) dollars shall at once become due and payable, anything thereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said thirty (30) days, without notice:

91 Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in said principal note, with the interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part and his successors in trust and assigns forever, all the certain lot, piece, or parcel of land situate, lying, and being in the city of Chicago, county of Cook, in the State of Illinois, known and described as follows, to wit:

Commencing at a point on the east line of Reuben street (being the east line of said street, as it is now widened to one hundred (100) feet at a point one hundred (100) feet north of the northeast corner of Monroe street and Reuben street, widened as aforesaid, running thence north with said east line of Reuben street (widened) thirty-three (33) feet, running thence east and parallel with Monroe street one hundred and fifty (150) feet to an alley, running thence south with the west

92 line of said alley and parallel with Reuben street thirty three (33) feet, running thence west and parallel with Monroe street one hundred and fifty feet (150) to the place of beginning, together with the three story and basement brick and stone dwelling-house, and all other improvements on or that may be placed upon said land, the north line of said premises being a line running east and west through the center of the partition-wall between said dwelling house and the dwelling house adjoining it upon the north, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower, and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the above-granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his successors in trusts and assigns forever:

In trust, nevertheless, that if default shall be made in the payment of the said principal sum of money above mentioned, whether the same shall have become due by election as aforesaid or by the regular

93 maturity of said note five (5) years after the date thereof, or of the interest that may grow due thereon, or any part thereof, at the time and times respectively when the same ought to be paid, as set forth in the said principal note, or if the said George Bartalott, his heirs, executors, or administrators, shall at any time hereafter, until said principal sum and all arrearings of interest thereon shall be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or shall do or permit to be done to, upon, or about said premises, or any part thereof, anything that may in anywise tend to diminish the value thereof, or to impair, weaken, or diminish the security intended to be affected under and by virtue of this instrument,

or shall neglect or fail to keep all the buildings, except outhouses, that now or hereafter may be situate upon said premises, insured, and cause such insurance to be made payable, in case of loss, to said party of the second part, or his successors in trust, and the policies of insurance and all renewal certificates thereof to be delivered to him or them, as hereinafter covenanted and provided, or shall fail in anywise promptly and faithfully to fulfil, keep, and perform all and singular the covenants and agreements contained in these presents, then, and from
94 thenceforth it shall be lawful for the said party of the second part, or his successors in trust, on application of the legal holder of such principal note, with or without a previous entry upon said premises, to sell and dispose of said premises hereby granted or intended so to be, and all right, title, benefit, and equity of redemption of said party of the first part, their heirs or assigns, therein, at public auction, to the highest bidder, for cash, having first given twenty (20) days' notice of the time and place of such sale, such sale to be made at the north door of the court-house of the county of Cook, in the city of Chicago, and State of Illinois, by advertisement in any one of the daily newspapers that may at that time be published in the English language in said city of Chicago, personal notice of such sale to said party of the first part, their heirs, executors, administrators, or assigns, or any and all persons claiming by, through, or under them, being hereby expressly waived and excused, and in the name of the said party of the second part, or his successors in trust, to make, execute, and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance for the premises sold in the law for the same in fee simple; and all the recitals that may be contained in
95 such deed or deeds, setting forth the fact of due notice, advertisement, and sale, and any and all such other facts and statements as may be proper to evidence the legality of such sale and conveyance, and that the same has been duly made in all respects so as to meet all the requirements herein contained or arising in law as may be necessary to convey a good title shall be deemed to be true, and shall be considered and taken as prima-facie evidence of all the facts and matters set forth in such recitals, and such deed or deeds shall be effectual to pass the title and all the right and equity of redemption of said party of the first part, their heirs and assigns, in and to the premises sold, and out of the money arising from such sale the said party of the second part or his successors in trust shall pay—

First. All the costs, charges, and expenses of such advertisement, sale, and conveyance, including commissions, such as are at the time of such sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution in said Cook County.

Second. All premium money paid for any insurance, as hereinafter provided, and all money and sums of money which said party of the second part or his successors in trust may at any time before such sale pay or expend to redeem said above-described premises from any
96 sale or sales for taxes or assessment, or to save the same from such sale, or to protect the title or possession of said premises or any part thereof, with interest on all money so advanced or expended, at the rate of ten per centum per annum, from the time of so paying or expending the same up to the time of such sale.

Third. All of said principal money and accrued interest thereon that shall at the time of such sale remain unpaid, whether due or not due; and,

Fourth. Render the overplus of the purchase money, if any there be,

unto the said George Bartalott, his executors, administrators, or assigns, on reasonable request. And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase money; which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party in the first part, their heirs and assigns, and all other persons claiming or to claim the said premises, or any part thereof, by, from, or under them, or any of them. And the said party of the first part, for the purpose of enabling said party of the second part and his successors in trust to make an advantageous and judicious sale of said premises, do hereby authorize
97 and empower him or them to adjourn said sale from time to time at his or their discretion, of which adjourned sale it shall be sufficient to give ten days' notice by advertisement in such newspaper as aforesaid, the first publication whereof to be on the day following the day on which, but for such adjournment, said sale would have taken place; and the party of the second part, or his successors in trust, need not go to the said place of sale to announce such adjournment; and at such sale said party of the second part and his successors in trust may sell said premises entire, without division, or in parcels, as he or they may elect.

And the said party of the first part, for the consideration above mentioned, and in order to create a first lien and incumbrance on said premises under this deed, for the purposes aforesaid, and to carry out the foregoing specific application of the proceeds of any sale that may be made by virtue hereof, do hereby expressly waive and release all right and benefit which they have, or to which they may be entitled in and to said premises, or the proceeds of sale thereof, under and by virtue of an act of the general assembly of the State of Illinois, entited "An act to exempt homesteads from sale or execution," approved February 4th, A. D. 1851; and also an act entitled "An act to amend an act to exempt
98 homesteads from sale on execution," approved February 17th, A. D. 1857, as well as under any and all other acts of said general assembly of a like character or for a similar purpose, and agree to surrender possession of said premises to the purchaser or purchasers at such sale peaceably on demand.

And the said George Bartalott and George H. Barbier, for themselves and for their heirs, executors, and administrators, do covenant, bargain, and agree to and with the said party of the second part, his successors in trust, and assigns, that said George Bartalott is well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free from all other and former grants, mortgages, liens, incumbrances, taxes, assessments, or sales therefor of any name, kind, nature, or description whatsoever, and the same in the peaceable and quiet possession of the party of the second part, his successors in trust, his and their assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they and they will warrant and forever defend.

99 And the said George Bartalott and George H. Barbier, for themselves and for their heirs, executors, and administrators, do covenant, grant, and agree to and with the said party of the second part and his successors in trust, that they will well and truly pay the principal sum of money and interest thereon mentioned in said principal-note, according to the tenor and effect thereof, and will not at any

time hereafter, until the said principal sum and the interest thereon shall be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, nor do nor permit to be done to, in, upon, or about said premises anything that may in anywise tend to impair the value thereof, or to weaken, or diminish, or impair the security intended to be affected under and by virtue of this instrument. And further, that said George Bartalott, his heirs, executors, administrators, and assigns, shall and will at all times hereafter, until said principal sum of money and all arrearages of interest thereon shall be fully paid, keep all the buildings, outhouses excepted, now situate or may be hereafter erected upon said premises, fully insured against loss or damage by fire in some good and responsible insurance company or companies, the selection of such insurance company or com-
100 panies to be left to the option of said party of the second part or his successors in trust, in the fair insurable value of such buildings, and cause such insurance to be made payable in case of loss to the said party of the second part or his successors in trust, and deliver to him or them, each, all, and every, the policies of insurance thereof, as soon as and whenever such insurance shall be affected, and all renewal certificates of such policies, and in default of so doing the said party of the second part or his successors in trust, at his or their option, may effect such insurance in his or their own name or names, or otherwise, and the premium money paid therefor shall be a charge upon said premises, and shall be and is hereby declared to be secured by this instrument, in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said George Bartalott and George H. Barbier, their heirs and legal representatives, to the said party of the second part or his successors in trust on demand, and may be collected at any time after the same shall have been paid, with interest thereon at the rate of ten per centum per annum from the time the same shall be advanced,
101 and the said party of the second part or his successors in trust shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all sums of money that may at any time become collectable and receivable upon each, all, and every of such policies of insurance, and apply the same when received in the same manner, as far as possible, as is hereinbefore provided for the application of the proceeds of a sale of said above-described premises, under the power of sale hereinbefore contained. But nothing herein contained shall be construed as requiring the said party of the second part or his successors in trust to incur any expense or make any effort to collect any money that may become due on any part of such policies of insurance, but if he or they shall elect not to collect the same, he or they shall make such election within a reasonable time after such money shall become collectable, and on demand of said George Bartalott or his legal representatives shall thereupon forthwith, after making such election not to collect, execute any necessary order or assignment to cause said insurance money to be paid to said George Bartalott, his executors, administrators, or assigns.

102 A reconveyance of said premises shall be made by the party of the second part or his successors in trust to George Bartalott, his heirs or assigns, at his or their expense, on full payment of indebtedness aforesaid, and performance of the covenants and agreements made herein by the party of the first part.

And in the case of the death, absence from the city of Chicago, inability or refusal to act of the said party of the second part, at any time when his action under the foregoing powers and trusts may be required, then Francis B. Peabody, of Chicago, aforesaid, shall be and he hereby is appointed and made successor in trust to said party of the second part under this deed, with like powers and authority, and said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

And in case of death, absence from the city of Chicago, inability or refusal to act of said party of the second part, and of the said Francis B. Peabody, at any time when action under the foregoing powers and trusts may be required, then George L. Paddock of Chicago aforesaid shall be, and he hereby is, appointed and made successor in trust to said party of the second part, and the said Francis B. Peabody, under
103 this deed, with like powers and authority, and said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

In testimony whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE BARTALOTT. [SEAL.]
ANNA BARTALOTT. [SEAL.]
GEORGE H. BARBIER. [SEAL.]
CAROLINE BARBIER. [SEAL.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, H. P. Parmalee, a notary public in and for the city of Chicago, county and State aforesaid, do hereby certify that George H. Barbier and Caroline Barbier, who are personally known to me to be the real persons whose names are subscribed to the foregoing instrument, as having executed the same, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all his right, title, and interest in and to the premises described in said instrument, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called, of the State of Illinois.

104 Given under my hand and notarial seal this fourteenth day (14) of April, A. D. 1869.

[SEAL.] H. P. PARMALEE,
Notary Public.

Acknowledgment.

STATE OF PENNSYLVANIA,
City of Philadelphia, Philadelphia County, ss:

I, Thomas F. Manderfield, a notary public in and for said county, in the State aforesaid, do hereby certify that George Bartalott, and Anna his wife, and Caroline, wife of George H. Barbier, personally known to me as the same persons whose names are subscribed to the annexed
105 instrument of writing, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument in writing, as their free and voluntary act, for the uses and purposes therein set forth, and thereby conveyed all their rights, title, and interest in and to the premises described in said instrument, and expressly waive and release all right, claim, benefit, privilege, advan

tage, and exemption under any and all laws of Illinois relating to the exemption of homesteads.

And the said Caroline, wife of the said George H. Barbier, and Anna, wife of the said George Bartalott, having been by me examined separate and apart, out of the hearing of their said husbands, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to them, and they also by me being fully informed of their rights under the homestead laws of Illinois, acknowledged that they had freely and voluntarily executed the same, and relinquished their dower to the lands and tenements therein mentioned, and also their rights and advantages under and by virtue of all laws of Illinois relating to the exemption of homesteads, without compulsion of their husbands, and that they do not wish to retract the same. [SEAL.]

Given under my hand and notarial seal this nineteenth day of April, A. D. 1869.

THOMAS F. MANDERFIELD,
Notary Public.

(Endorsed:) No. 13060. Filed for record May 25, A. D. 1869, at 4 o'c'k p. m. Recorded in book 506 of deeds, page 408. Norman T. Gassette, recorder.

106 $315.00. CHICAGO, *Mar. 15th*, 1869.

Due to the order of The Hartford Fire-Insurance Company three hundred and fifteen (315) dollars, on the fifteenth day of March, A. D. 1874, without grace, at the office of The *the* Hartford Fire-Insurance Company, in Hartford, Connecticut, with interest at the rate of ten per cent per annum, after maturity; being for an installment of interest due on that day upon our joint and several principal promissory notes, not of even date herewith, payable to the order of The Hartford Fire Insurance Company five (5) years after its date, for the sum of seven thousand dollars ($7,000), secured by a trust-deed upon real estate in Chicago aforesaid, to which are affixed U. States revenue-stamps for seven (7) dollars, duly canceled.

In consideration of the premises, we do hereby make and appoint Benjamin E. Gallup, of the law-firm of Gallup and Peabody, or any other attorney of any court of record in the United States of America,
107 to be our true and lawful attorney for us and each of us, and in our and each of our names, places, and steads, to appear in any court of record in term-time, or vacation, in any State, district, or Territory of the United States, at any time after this interest-coupon becomes due, to waive service of process, accept a declaration, and confess a judgment in favor of the legal holder hereof, for the amount due and unpaid hereon, with interest as aforesaid, to the day of entering such judgment, together with costs, and 25 dollars for the attorney's fee; and to file a cognovit for such amounts, with an agreement therein that execution may issue forthwith, and that no writ of error or appeal shall be prosecuted upon such judgments, nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment, or issuing the execution thereon. Hereby ratifying and confirming all that our said attorney may do by virtue hereof.

GEORGE BARTALOTT.
GEORGE H. BARBIER.

No. 10.

(Endorsed on the back thereof:) Geo. L. Chase, treas.

108 CHICAGO, ILLINOIS,
March 15th, 1869.

$7,000.

Five (5) years after date, for value received, we jointly and severally promise to pay to the order of the Hartford Fire-Insurance Company the principal sum of seven thousand (7,000) dollars, with interest thereon at the rate of nine per cent. per annum, payable half-yearly, to wit, on the fifteenth (15) day of September and of March in each year, until said principal sum is fully paid, and both principal and interest payable at the office of the Hartford Fire-Insurance Company, in Hartford, Connecticut.

The several installments of interest aforesaid, for said period of five (5) years, are further evidenced by ten (10) interest notes, or coupons, of even date herewith.

It is further expressly agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place aforesaid when and where the same becomes due and payable, and such default shall continue for thirty (30) days after such
169 installment becomes due and payable as aforesaid, then, and in that event, the said principal sum of seven thousand (7,000) dollars shall, at the election of the legal holder thereof, at once become and be due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made any time after the expiration of said thirty (30) days, without notice.

The payment of this note is secured by a trust-deed on real estate in Chicago aforesaid, to which are affixed United States revenue-stamps for seven (7) dollars, duly canceled.

GEORGE BARTALOTT.
GEORGE H. BARBIER.

No. 1.

Know all men by these presents that we, the subscribers, are jointly and severally justly indebted to the legal holder of the promissary note hereinafter mentioned in the sum of seven thousand (7,000) dollars, secured to be paid by a promissary note of said sum of seven thousand (7,000) dollars, of even date herewith, made by us, payable to the order of the Hartford Fire-Insurance Company five (5) years after its date, with interest thereon at the rate of nine (9) per cent. per annum, payable half-yearly, to wit, on the fifteenth (15) day of September and of March in each year, until said principal sum is fully paid, and
110 both principal and interest payable at the office of the Hartford Fire-Insurance Company, in Hartford, Connecticut. By which note it is further expressly agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place aforesaid, when and where the same becomes due and payable, and such default shall continue for thirty (30) days after such installment becomes due and payable as aforesaid, then and in that event the said principal sum of seven thousand (7,000) dollars shall, at the election of the legal holder of said note, at once become and be due and payable, anything thereinbefore contained to the contrary notwithstanding; such election to be made at any time after the expiration of said thirty (30) days, without notice.

Now, therefore, in consideration of the premises, we do hereby make, constitute, and appoint Benjamin E. Gallup, of the law-firm of Gallup and Peabody, or any other attorney of any court of record in the United

States of America, to be our true and lawful attorney, irrevocably, for us and each of us, and in our and each of our names, places, and steads, to appear in any court of record in term-time, or in vacation, in any State, district, or Territory of the United States, at any time after said note becomes due, whether by election, as aforesaid, or by the ex-
111 piration of said five (5) years, to waive the service of process and confess a judgment in favor of the legal holder of said note upon the said note for the above sum, or for as much as appears to be due according to the tenor and effect of said note and interest unpaid thereon to the day of the entry of said judgment, together with the costs and 100 dollars for the attorney's fees; and also to file a cognovit of the said amounts, with an agreement therein that execution may issue forthwith, and that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, or any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up of said judgment or issuing the execution thereon, hereby ratifying and confirming all that our said attorney may lawfully do by virtue hereof.

Witness our hands and seals this fifteenth day of March, A. D. 1869.

GEORGE BARTALOTT. [SEAL.]
GEORGE H. BARBIER. [SEAL.]

M. BLYNN.

112 EXHIBIT D.

CHICAGO, *Nov. 22d*, 1870.

I have this day sold Ida R. Brine, wife of George J. Brine, the south house of the block on the east side of Ashland avenue, commencing about one hundred feet north of Monroe street, being number 84, for the sum of eighteen thousand dollars, five thousand dollars of which sum he has this day paid to me; the balance, except an encumbrance of some seven or eight thousand dollars which he is to assume and deduct, to be paid within twelve months, with eight per cent. interest until paid. Title to be perfect.

(Signed) SAM'L J. WALKER.

113 EXHIBIT E.

This indenture, made this twentieth day of February, in the year of our Lord one thousand eight hundred and seventy-four, between Samuel J. Walker and Amanda M. Walker, his wife, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and J. Irving Pearce, of the city of Chicago, in county of Cook and State of Illinois, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have remised, released, sold, conveyed, and quitclaimed and by these presents do remise, release, sell, and convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demands, which said party of the first part had in and to the following described
114 lot, piece or parcel of land, situated in the county of Cook and State of Illinois, and known and described as follows, to wit:

Beginning at a point on the east line of Ashland avenue, one hundred (100) feet north of the northeast corner of Monroe street and said ave-

nue; running thence north thirty-three feet (33); thence east on a line paral'el with the north line of said Monroe street one hundred and fifty (150) feet, more or less, to an alley; thence south on the west line of said alley thirty-three (33) feet; thence west on a line paral'el with the said north line of Monroe street one hundred and fifty (150) feet, more or less, to place of beginning; said premises lying and being in block numbered six (6), in the canal trustees' subdivision of the west half (W. ½), and the west half (W. ½) of the northeast quarter (N. E. ¼), of section seventeen (17), township 39 north, range fourteen (14) east of the third (3rd) principal meridian, in the city of Chicago and county and State aforesaid.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the
115 second part, his heirs and assigns, forever.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption, under and by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) SAMUEL J. WALKER. [SEAL.]
AMANDA M. WALKER. [SEAL.]

STATE OF ILLINOIS,
County of Cook, ss:

I, Parke B. Chase, a notary public for and residing in said county, in the State aforesaid, do hereby certify that Samuel J. Walker and Amanda M. Walker, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including
116 the release and waiver of the right of homestead.

Given under my hand and notarial seal this twentieth day (20) of February, A. D. 1874.

[NOTARIAL SEAL.] (Signed) PARKE B. CHASE,
Notary Public.

No. 152265.

STATE OF ILLINOIS,
County of Cook, ss:

Filed 24th of Feb'y, A. D. 1874, at 1 o'c'k p. m., and recorded in book 134 of records, page 115. Mar. 2nd, 1874.

(Signed) JA'S STEWART,
Recorder.

117 EXHIBIT F.

Silas M. Moore, James H. Moore, John J. James.

CHICAGO, *May 26th*, 1875.

M'r B. E. Gallup, trustee, to S. M. Moore & Co., agents, d'r, 119 & 121 *La Salle street.*

1875.	To insurance on.	Location.	Company.	Amount.	Rate.	Premium.
May 5	Dw'g.....	84 Ashland av.	Germ. Am.	6,000	½	30 00

Paid.

S. M. MOORE & CO.

(Endorsed:) Filed May 27th, 1875. W'm Bradley, cl'k.

118 Afterwards, to wit, on the 31st day of May, A. D. 1875, in th adjourned May term of said court in the record of the proceeding thereof in said entitled cause, before the Hon. Henry W. Blodgett, distric judge, is the following entry, to wit:

THE HARTFORD LIFE-INSURANCE COMPANY *vs.* GEORGE BARTALOTT ET AL. } In chancery.

On motion of complainants' solicitor, leave is given John I. Bennett, special master, to amend his report herein.

119 Afterwards, to wit, on the 2d day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE-INSURANCE COMPANY *vs.* GEORGE BARTALOTT ET AL. } In chancery.

On motion of complainant's solicitors, it is ordered that the report of John I. Bennett, esq., special master, filed herein, be confirmed, unless cause be shown to the contrary by Monday morning.

120 Afterwards, to wit, on the 5th day of June, A. D. 1875, said defendant, Ida Winter Brine, by her solicitor, filed in said clerk's office her exceptions to the report of said master, which exceptions are in the words and figures following, to wit:

Exceptions of Ida Winter Brine to master's report.

In the circuit court of the United States, northern district of Illinois.

THE HARTFORD FIRE-INSURANCE COMPANY *vs.* GEORGE BARTALOTT, ANNA BARTALOTT, George W. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, and J. Irving Pearce.	In chancery.

Exceptions taken by said defendant, Ida Winter Brine, by George J. Brine, her guardian ad litem, to the report of John I. Bennett, esq., special master appointed in this cause, which report bears date the 23d day of May, A. D. 1875.

1st. For that the said master hath not in and by his said report allowed to said defendant, or deducted from the purchase-money due from her on said contract in writing, marked "Exhibit D," and attached to said master's report, the amount of money expended by her late mother, Ida R. Brine, in the finishing and repair of said house, 84 Ashland avenue, being the premises described in said contract, marked "Exhibit D."

121 2nd. For that the said master hath in and by his said report allowed against this respondent interest on the balance of the purchase-money claimed to be due to said Walker under said contract, marked "Exhibit D," from and after the time when Walker failed and refused to execute and deliver to said Ida R. Brine, mother of this defendant, a deed of conveyance in pursuance of said contract, marked "Exhibit D," and from and after the time when said Walker wrongfully conveyed the property described in said contract to said Pearce, and from and after the time when said Pearce wrongfully received the said property by deed from said Walker.

3d. For that the said master hath in and by his said report found that this defendant is entitled to the balance of the money, if any, which the said premises may bring at a sale made, or to be made, on a foreclosure of the deed of trust described in said bill of complaint, whereas the said master ought to have found that this defendant has a lien in equity on such balance to the extent of the sum of five thousand ($5,000) dollars, the amount of the purchase-money paid for said premises by said Ida R. Brine, and also the amount expended by her in the finishing and repair of said premises and interest on each of said sums from the time they were paid.

Wherefore the said defendant doth except to the said master's
122 said report and appeals therefrom to the judgment of this honorable court.

FRANCIS A. RIDDLE,
Sol'r for Ida W. Brine.

(Endorsed:) Filed June 5, 1875. W'm H. Bradley, cl'k.

123 Afterwards, to wit, on the 19th day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, ET AL. } In chancery.

Now come the parties, by their solicitors, and now come on to be heard the exceptions of Ida Winter Brine to the report of John I. Bennett, special master herein, and thereupon the court overrules said exceptions as to priority of complainant, and as to the distribution of the proceeds the same is continued.

124 Afterwards, to wit, on the 25th day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce. } In chancery.

This cause having this day been brought on to be heard upon the exceptions filed by said defendant, Ida Winter Brine, by her guardian ad litem, to the report of the special master in chancery herein, and said exceptions having been argued by counsel on behalf of said Ida Winter Brine and her said guardian ad litem, as also by counsel for said defendant Pearce and said complainant, respectively; and it appearing to the court that neither said Ida Winter Brine nor said Pearce has or claims any equity herein, save subject to the deed of trust mentioned in said complainant's bill of complaint herein, and that the matter of said exceptions relates solely to the conflicting claims of said Ida Winter Brine and said Pearce to such surplus of moneys, if any, as may
125 arise upon a sale of the premises in such deed of trust mentioned, after the satisfaction of the indebtedness due said complainant upon said deed of trust, with costs herein, it is ordered and decreed by the court that, as to so much of the report of said special master as finds and reports the amount due to said complainant upon the security of the notes and deed of trust in said bill of complaint mentioned, the said report be approved and confirmed.

And it is further ordered and decreed that the matters in said report relating to the aforesaid claims of said defendants, Ida Winter Brine and J. Irving Pearce, and the aforesaid exceptions of said Ida Winter Brine, be continued for the further order of the court, with liberty to either of said defendants to apply to the court for such further order upon the coming in of the report of sale herein, if it shall appear that there is any surplus at such sale.

126 Afterwards, to wit, on the 26th day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said court, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE HARTFORD FIRE INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, GEORGE H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, trustee, and J. Irving Pearce. } In chancery.

This cause having this day been brought on to be heard upon the bill of complaint filed herein, answers *answer* of the guardian ad litem of said minor defendant, Ida Winter Brine, replications, pleadings, proofs, evidence, reports of the special master, and exhibits herein, and was argued by counsel; and this court, being fully advised in the premises, doth find and adjudge that all the material allegations in the said bill of complaint contained have been fully proved, and that there is due to the complainant in this cause, from the said defendants, George Bartalott and George H. Barbier, the sum of eight thousand one hundred and seventy dollars and twenty-four cents, with interest thereon from the twenty-third day of May, A. D. 1875, the date of said special
127 master's report:

It is therefore, upon motion of counsel for the complainant, ordered, adjudged, and decreed that the said defendants, George Bartalott and George H. Barbier, or some of the other defendants in this cause, pay, or cause to be paid, to the complainant, within one hundred days from the date of the entry of this decree, the said sum of eight thousand one hundred and seventy dollars and twenty four cents, with interest thereon at the rate of six per centum per annum from the said twenty-third day of May, A. D. 1875 (being the date of said special master's report), to the day of such payment; and in default of so doing, that all and singular the said premises mentioned and described in the said bill of complaint, and hereinafter described, or so much thereof as may be sufficient to satisfy the amount due to the complainant, as hereinbefore adjudged, together with interest and the costs in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, for cash in hand, by John I. Bennett, esq., as special master in chancery of this court, for that purpose hereby constituted; and that said John I. Bennett, special master, make such sale in accordance with the course and practice of this court; and that at such sale the complainant, or any of the parties to this cause, may become the purchaser; that such special master make such
128 sale at the front door, on La Salle street, of the building in which this court is held, having given twenty (20) days' notice of such sale by the publication of notice thereof in some newspaper published at the city of Chicago, in said district, containing a description of said premises, and the time, place, and terms of said sale.

The premises authorized to be sold under and by virtue of this decree are the following, to wit:

All that certain lot, piece, or parcel of land situate, lying, and being in the city of Chicago, in the county of Cook and State of Illinois, known and described as commencing at a point on the east line of Reuben street (Ashland avenue), as now widened to the width of one hundred feet, said point being one hundred (100) feet north of the northeast corner of Monroe street and said Reuben street (Ashland avenue), widened as aforesaid; running thence north with said east line of said Reuben street (Ashland avenue), widened as aforesaid, thirty-three (33) feet; running thence east and parallel with said Monroe street one hundred and fifty (150) feet to an alley; running thence south with the west line

of said alley and parallel with said Reuben street (Ashland avenue) thirty-three (33) feet; running thence west and parallel with said Monroe street one hundred and fifty (150) feet to the place of beginning; together with the brick and stone dwelling-house and all other
129 improvements thereon; the north line of said premises being a line running east and west through the centre of the partition-wall between said dwelling-house and the dwelling-house adjoining it on the north; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

It is further ordered that said John I. Bennett, esq., as such special master, make report to this court of such sale, and of his acts and doings hereunder, for approval and confirmation, and for further direction herein, and that he retain from the proceeds of said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such proceeds, if any, into court, to abide the further order of the court, and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit and expenses of sale, as aforesaid, that the said special master specify the amount of such deficiency in his said report of sale.

And it is further ordered that the clerk of this court hold such moneys so to be paid him by said special master, subject to the further order and direction of this court in this cause, and that this cause stand over for such further order and direction.

130 And thereupon said defendant, Ida Winter Brine, by her solicitor, prays an appeal to the Supreme Court of the United States, which is allowed, upon giving bond herein in the penal sum of five thousand dollars, with security to be approved by the court.

131 On the same day, to wit, the 26th day of June, A. D. 1875, said defendant, Ida Winter Brine, by her solicitor, filed in said clerk's office, her certificate of evidence in said entitled cause; which said certificate is in the words and figures following, to wit:

Certificate of evidence.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States for the northern district of Illinois.

THE HARTFORD FIRE-INSURANCE COMPANY	
v.	
GEORGE BARTALOTT, ANNA BARTALOTT, George H. Barbier, Caroline Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamin E. Gallup, and J. Irving Pearce.	In chancery.

Be it remembered that, on the 27th day of May, A. D. 1875, the special master in chancery, appointed by said court, filed herein his report and the testimony taken on reference of the above-entitled cause to him. And I hereby certify that the following is a correct statement of the evidence and exhibits submitted to the court by such report, and upon which said cause was heard.

On complainant's behalf were offered the deed of trust, with certificate of acknowledgment, and notes signed, sealed, and executed by George Bartalott and George H. Barker, and in the case of the
132 trust deeds by their respective notes to the complainant; the evidence of Henry Reeke, Francis B. Peabody, J. Irving Pearce, U. O. Van Every; the receipt of insurance signed by S. M. Moore and Co., all of which is attached to said special master's report, and heretofore set out in this record, and which was all the evidence offered by the complainant.

On the part of the defendant Ida Winter Brine, was offered the deposition of George J. Brine, and a certain written contract in writing, signed by Samuel J. Walker, all of which are attached to said special master's report, and marked "Exhibit D," and heretofore set out in this record.

And on the part of the defendant J. Irving Pearce was offered in evidence a paper purporting to be a quitclaim deed attached to said special master's report, as also the deposition of the said J. Irving Pearce, and marked "Exhibit E."

H. W. BLODGETT,
Judge.

(Endorsed:) Filed June 26, '75. W'm H. Bradley, clerk.

133 The cross-bill offered to be filed by the said defendant Ida Winter Brine reads in the words and figures following, to wit:

Cross-bill of Ida Winter Brine.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

To the judges of the circuit court of the United States for said northern district of Illinois, sitting in chancery:

Your oratrix, Ida Winter Brine, a citizen of the State of Illinois, and a resident of said northern district of Illinois, an infant, by George J. Brine, her father and next friend, brings this her cross-bill of complaint against the Hartford Fire-Insurance Company, a corporation organized under and by virtue of the laws of the State of Connecticut, and having its principal office and place of business in the city of Hartford, in said State of Connecticut, and a citizen of the last-named State; Samuel J. Walker and J. Irving Pearce, citizens of said State of Illinois, and residents of said northern district of Illinois, defendants.

134 And thereupon your oratrix complains and says that heretofore, to wit, on the 22nd day of November, in the year 1870, said defendant Samuel J. Walker was the owner, by purchase and conveyance from George Bartalott and George H. Barbier, in fee-simple, of a certain piece or parcel of land, situate in the city of Chicago, in the county of Cook and State of Illinois, described as follows, to wit:

Commencing at a point on the east side of Reuben street, being the east line of said street as it is now widened to one hundred feet, at a point one hundred feet north of the northeast corner of Monroe street and Reuben street widened as aforesaid; running thence north, on said east line of Reuben street, widened, thirty-three (33) feet; running thence

east, and paral'el with Monroe street, one hundred and fifty feet, to an alley; running thence south, with the west line of said alley, and paral'el with Reuben street, thirty-three (33) ; running thence west, paral'el with Monroe street, one hundred and fifty (150) , to the place of begining; subject, however, to the incumbrance of a certain deed of trust, dated on the 15th day of March, in the year 1869, made and ex-
135 ecuted by George Bartalotte and Anna, his wife, and George H. Barbier and Caroline, his wife, to Benjamin E. Gallup, as trustee, in trust to secure to said The Hartford Fire Insurance Company the payment of a certain principal promissary note of said George Bartalotte and George H. Barbier, for the sum of seven thousand dollars ($7,000), payable to said The Hartford Fire-Insurance Company, bearing date of the 15th day of March, in the year 1869, and due in five years after the date thereof; and also of ten certain interest-notes of the same date and made by the same parties, payable to said The Hartford Fire-Insurance Company, each for the sum of three hundred and fifteen (315) dollars, payable respectively at semi-annual periods after date, and drawing interest at the rate of ten per centum per annum after maturity.

And your oratrix further showeth unto your honors that on said 22nd day of November, in the year 1870, and while said Samuel J. Walker was the owner of said premises in manner aforesaid, said Samuel J. Walker made, executed, and delivered to one Ida R. Brine, in the name and style of Ida A. Brine, a contract in writing, subscribed by him, the said Samuel J. Walker, wherein and whereby said Samuel J.
136 Walker agreed to sell to said Ida R. Brine, and said Ida R. Brine agreed to purchase of said Samuel J. Walker, the premises aforesaid, for the sum of eighteen thousand ($18,000) . Five thousand ($5,000) dollars whereof said Ida R. Brine was by the provisions of said contracts in writing to pay, and did pay, to said Samuel J. Walker, at the said time of the making of said contract in writing; and the balance of which sum of eighteen thousand ($18,000) dollars, after deducting the amount of the incumbrance of said deed of trust described in said contract in writing as "an incumbrance of some seven or eight thousand dollars," which said Ida R. Brine thereby assumed and agreed to pay, was to be paid by said Ida R. Brine to said Samuel J. Walker within one year from the said time of the making of said contract in writing, with interest at the rate of eight (8) per centum per annum until paid. Upon the payment whereof, in manner aforesaid, said Samuel J. Walker bound himself, by said contract in writing, to convey to said Ida R. Brine a perfect title to said premises, subject, however, to the incumbrance aforesaid, a copy of which said contract in writing so as aforesaid made
137 by and between said Samuel J. Walker and said Ida R. Brine your oratrix attaches to this her cross-bill of complaint, marked "Exhibit A," and prays to be taken as a part hereof.

And your oratrix further showeth unto your honors that the premises described and specified in said contract in writing, a copy whereof is hereto attached as Exhibit "B," are the same premises as are more particularly described herein by metes and bounds, and as were conveyed in and by said deed of trust made as aforesaid by said Bartalott and wife and Barbier and wife to said Gallup.

And your oratrix further showeth unto your honors that after the execution of said contract in writing by said Samuel J. Walker, and on or about the 22nd day of November, in the year 1870, said Ida R. Brine, by and with the full knowledge and consent of said Samuel J. Walker, entered into said premises and took possession thereof under said con.

tract in writing, and occupied said premises as her residence, and continue' so to occupy the same from the time last aforesaid up to the time of her decease, as hereinafter mentioned; that within one year after the date of said contract in writing, and after the time of the making thereof, said Ida R. Brine tendered to said Samuel J. Walker, and
138 offered to pay to him, the balance of said sum of eighteen thousand ($18,000) dollars, the amount of the purchase-money of said premises, after deducting the said sum of five thousand (5,000) dollars which said Ida R. Brine paid to said Samuel J. Walker at the time of the execution of said contract in writing, and after deducting also the amount of the incumbrance of said deed of trust, and demanded of said Samuel J. Walker a deed of conveyance of said premises, according to the form and effects of said contract in writing executed as aforesaid by said Samuel J. Walker, and said Samuel J. Walker then promised said Ida R. Brine to prepare said deed of conveyance and deliver the same to her in a short time; that repeatedly within said period of one year, and after the same period had expired, up to the time of her decease, said Ida R. Brine offered to pay said balance due on said contract in writing to said Samuel J. Walker, and demanded of him a deed of conveyance of said premises, in pursuance of said contract in writing, but said Samuel J. Walker, at all times of the making of said offers and demand, merely stated that he would make out and
139 deliver to said Ida R. Brine such deed of conveyance as soon as he had time to do so, and that a delay in the premises would not prejudice the rights of said Ida R. Brine in regard to said contract in writing.

And your oratrix further showeth unto your honors that, on the 8th day of October, in the year of our Lord one thousand eight hundred and seventy-three (1873), said Ida R. Brine departed this life, intestate; that at the time of the execution of said contract in writing by said Samuel J. Walker said Ida R. Brine was the lawful wife of George J. Brine, the father and next friend of your oratrix; that your oratrix is the sole and only issue of the marriage of said Ida R. Brine and George J. Brine, and is the sole and only heir at law of said Ida R. Brine; and that upon the death of said Ida R. Brine your oratrix became and was by operation of law vested with all the rights and interest of said Ida R. Brine at the said time of her decease in and to said contract in writing, and said premises therein and thereby purchased by her from said Samuel J. Walker in manner aforesaid.

And your oratrix further showeth unto your honors that, after
140 the death of said Ida R. Brine, and on or about the 18th day of October, in the year 1873, your oratrix, by her father, George J. Brine, offered to pay to said Samuel J. Walker the said balance so due to him on said contract in writing for the sale of said premises, and demanded of said Samuel J. Walker a deed of conveyance of said premises, and your oratrix hath repeatedly since that time renewed said offer and demand through and by her father, as aforesaid; but your oratrix states and shows to your honors that said Samuel J. Walker failed at all times when said offers and *and* demands were made by your oratrix upon him, as aforesaid, to comply with the same, but stated that he would do so as soon as he could.

And your oratrix shows unto your honors that ever since the decease of said Ida R. Brine at the time aforesaid, your oratrix, with her father, the said George J. Brine, has been in the occupancy and possession of said premises, by actual and exclusive residence thereon, by virtue of her right and title in and to said premises as the sole heir at

law of the said Ida R. Brine; that at all times since the balance of
141 said purchase-money became due to said Samuel J. Walker on said contract in writing for the sale of said premises, said Ida R. Brine in her life-time, and since the time aforesaid of her decease your oratrix, was and hath been and your oratrix still is, ready and willing to pay the balance of said purchase-money for said premises to said Samuel J. Walker, or to any other person who may be by law entitled to receive the same from your oratrix, upon the execution and delivery to your oratrix of a good and sufficient deed of conveyance of said premises to your oratrix.

And your oratrix further showeth unto your honors that said Ida R. Brine, in her life-time, paid all interest which accrued due and payable on said promissory interest-notes, secured by said deed of trust, up to the time of her decease, and your oratrix, after the decease of said Ida R. Brine, paid all of said interest-notes which became due up to the 15th day of March, in the year 1874, and your oratrix would have continued to pay the same, and would have paid and discharged the said principal note, and would have procured the discharge of said deed of trust, had the right and interest of your oratrix in and to said
142 contract in writing for the purchase of said premises not been disregarded and placed in jeopardy by said Samuel J. Walker and J. Irving Pearce in the manner hereinafter stated.

And your oratrix further states and shows unto your honors that on or about the 24th day of February, in the year one thousand eight hundred and seventy-four (1874), said Samuel J. Walker, by his quitclaim deed of that date, conveyed said premises to said J. Irving Pearce for the expressed consideration of one dollar; but your oratrix does not know what was the real consideration of said quitclaim deed, or whether there was any consideration whatever for the same; that your oratrix did not, nor did the said George J. Brine, know of the execution of said quitclaim by said Samuel J. Walker to said J. Irving Pearce until some time in the month of August, in the year 1874, at which time your oratrix first knew of the fact; that at the *the* time when said quitclaim deed was executed as aforesaid J. Irving Pearce had actual knowledge of the execution of said contract in writing by said Samuel J. Walker for the purchase of said premises by said Ida R. Brine and of the rights
143 of your oratrix in the premises, as well as notice in law, derived from the fact of the sale, exclusive and adverse possession and occupancy of said premises by your oratrix under said contract in writing, and with the consent of said Samuel J. Walker; and your oratrix states and shows to your honors that by virtue of the premises said J. Irving Pearce took said quitclaim deed of said premises from said Samuel J. Walker subject to the rights of your oratrix in and to said premises, and that in equity he ought to be held as the trustee of your oratrix in regard to said premises, and ought to be compelled to convey the same to your oratrix on the compliance by your oratrix with the terms and provisions of said contract in writing for the purchase of said premises; that said Samuel J. Walker has not at any time denied the claim of your oratrix for a conveyance of said premises or the rights of your oratrix to the same, but has stated since the execution of said quitclaim deed to said J. Irving Pearce that the same was executed merely for the purpose of having said J. Irving Pearce hold said premises for your oratrix, and without any consideration whatever.

And your oratrix shows that said Ida R. Brine has since the ex-
144 ecution of said contract in writing expended in improvements and repairs on said premises the sum of four thousand (4,000) dollars.

And your oratrix further showeth unto your honors that the said The Hartford Fire-Insurance Company has filed its bill of complaint in this honorable court, on the chancery side thereof, stating the fact of the execution of the said deed of trust, and charging that there is now due on the same, and on the said promissory note thereby secured as aforesaid, a large sum of money, amounting to over eight thousand two hundred (8,200) dollars, and praying for a foreclosure of said deed of trust, and a sale of said premises therein conveyed, for the payment of the money so alleged to be due, to which bill of complaint your oratrix is a party defendant; that your oratrix has duly answered said bill of complaint of said The Hartford Fire Insurance Company, in the usual form of an answer by an infant, and also by stating briefly the premises.

And your oratrix will hope that said J. Irving Pearce would have recognized and respected the right of your oratrix in the prem-
145 ises, and would have conveyed said premises to your oratrix on the payment by your oratrix to him, or to said Samuel J. Walker, as the one or the other might in equity be entitled thereto, of the balance of the said purchase-money for said premises, as specified in said contract in writing for the purchase thereof.

But now, so it is, may it please your honors, that the said I. Irving Pearce denies the rights of your oratrix in and to said premises, and asserts a claim thereto in his own right, and denies that he is bound to convey said premises to your oratrix on the payment by your oratrix of the balance of said purchase-money as aforesaid, and your oratrix states and shows unto your honors that your oratrix cannot safely redeem said premises from the lien of said deed of trust until the question of the right of your oratrix to compel said J. Irving Pierce to convey to your oratrix the said premises upon the payment of the balance of said purchase-money as provided in said contract in writing is determined in such a manner as to bind said J. Irving Pearce, and if your oratrix is granted such relief upon the payment of the balance of said purchase-money to whomsoever may be entitled thereto in equity, which
146 payment your oratrix is ready and willing and hereby offers to make as this honorable court may direct, then your oratrix will redeem said premises from said deed of trust, as in equity your oratrix ought to be permitted to do.

And now, forasmuch as your oratrix is without remedy in the premises at and by the strict rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, your oratrix asks the aid of the court in the premises, and that the above-named, The Hartford Fire-Insurance Company, Samuel J. Walker, and J. Irving Pearce, may be made defendants to this the cross-bill of complaint of your oratrix, and may be required to appear before the judges of this honorable court in chancery sitting, and to make answer to this your oratrix's cross-bill of complaint, according to the rules and practice of this honorable court, but not under oath, the oath to this respective answers being hereby expressly waived, and that on the final hearing hereof a decree may be entered in this court establishing the rights of your ora-
trix in and to said premises, and declaring said J. Irving Pearce
147 a trustee of said premises, for and in behalf of your oratrix, and directing him and the said Samuel J. Walker to convey said premises to your oratrix, upon the payment by your oratrix to either of them, as this court may determine, the balance of said purchase-money, according to the form and effect of said contract in writing for the

purchase of said premises and that said contract in writing may be in all things specifically performed, and that your oratrix may be allowed and permitted to redeem said premises from the incumbrance of said deed of trust by the payment of whatever sum of money may be found by this court to be due thereon; and that your oratrix may have such other and further relief as in your oratrix's case may be required and as to this court may seem meet and equitable.

And may it please your honors to grant unto your oratrix the usual writ of subpœnæ in chancery, issuing according to the rule and practice of this court, requiring the said defendants, and each of them, on a day certain, personally to be & appear in said cause, and make answer in manner aforesaid, and to stand to and abide by such order and decree as may be entered by this court in this cause.

148 And for the above and such other and better relief as unto eqnity may appertain, your oratrix does and will ever pray.

IDA WINTER BRINE,
Complainant,
By GEO. J. BRINE,
Her next Friend.
FRANCIS A. RIDDLE,
Solicitor for Ida Winter Brine.

JANIES E. MONROE,
Of Counsel.

EXHIBIT A.

CHICAGO, *November 23rd*, 1870.

I have this day sold to Ida R. Brine, wife of Geo. J. Brine, the south house of block on the east side of Ashland avenue, commencing about one hundred feet north of Monroe street, being No. 84, for the sum of eighteen thousand dollars, five thousand dollars of which sum she has paid this day to me, the balance, except an incumbrance of seven or eight thousand dollars, which she is to assume and deduct, to be paid within twelve months, with eight per cent. interest until paid.

Title to be perfect.

SAM'L J. WALKER.

[5 cent rev. stamp.]

149 And afterwards, to wit, on the 9th day of July, A. D. 1875, said defendant Ida Winter Brine filed in said clerk's office her bond in appeal in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal-bond.

Supreme Court of the United States.

THE HARTFORD FIRE-INSURANCE COMPANY
vs.
GEORGE BARTALOTT, ANNA BARTALOTT, Caroline Barbier, George H. Barbier, George J. Brine, Ida Winter Brine, Samuel J. Walker, Benjamim E. Gallup, and J. Irving Pierce.

Know all men by these presents, that we, Ida Winter Brine, by George J. Brine, her guardian ad litem, John B. Lyon and Nathanie K. Fairbank, of Chicago, Illinois, are held and firmly bound unto the

Hartford Fire-Insurance Company of Hartford, Connecticut, in the sum of five thousand ($5,000.00) dollars, to be paid unto the said Hartford Fire-Insurance Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 6th day of July, A. D. 1875.

Whereas the above-named Ida Winter Brine hath taken an ap-
150 peal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the northern district of Illinois, sitting in chancery:

Now, therefore, the condition of this obligation is such, that if the above-named Ida Winter Brine shall prosecute her said appeal to effect, and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

IDA WINTER BRINE.
By GEORGE J. BRINE, [SEAL.]
Her Guardian ad litem.
JOHN B. LYON. [SEAL.]
NATHANIEL K. FAIRBANK. [SEAL.]

Approved.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed July 9, 1875. W'm H. Bradley, cl'k.

151 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the Hartford Fire-Insurance Company is the complainant and George Bartalott et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 9th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

152 By the honorable Henry W. Blodgett, one of the judges of the circuit court of the United States for the northern district of Illinois.

To the Hartford Fire-Insurance Company:

Whereas Ida Winter Brine has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern district of Illinois, made in favor of you, the said Hartford Fire-Insurance Company, and has filed the security required by law: you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the eleventh day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Chicago, in the northern district

of Illinois, the eighth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

H. W. BLODGETT,
Judge.

153 We hereby accept service of the above and foregoing citation by the delivery of a copy thereof to us, as solicitors of said Hartford Fire-Insurance Company, this 24th day of July, 1875.

PADDOCK & IDE,
Solicitors.

(Indorsement on cover:) No. 279. Ida Winter Brine, by George J. Brine, her guardian ad litem, appellant, vs. The Hartford Fire-Insurance Company. N. Illinois C. C. U. S. Filed 22nd October, 1875.

United States Supreme Court.

OCTOBER TERM, A. D. 1877.

IDA WINTER BRINE, by GEORGE J. BRINE, her Guardian *ad litem*,
Appellant,
v.
THE HARTFORD FIRE INSURANCE COMPANY,
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

CHICAGO:
CHICAGO LEGAL NEWS CO., PRINTERS & STEREOTYPERS, 151 & 153 Fifth Ave.
1878.

United States Supreme Court.

OCTOBER TERM, A. D. 1877.

IDA WINTER BRINE,
BY GEORGE J. BRINE, HER GUARDIAN, *ad litem*,
Appellant,

v.

THE HARTFORD FIRE INSURANCE COMPANY,
Appellee.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

The appellee filed its bill in the Court below, December 17th, 1874, against George Bartalott, George H. Barbier, George J. Brine, Ida Winter Brine (the appellant), Benjamin E. Gallup, trustee, Samuel J. Walker and J. Irving Pearce, *to foreclose a mortgage* or trust deed, on certain land in Chicago, Illinois; alleging that, on the 15th day of March, 1869, appellee loaned to Bartalott and Barbier seven thousand dollars, for which they then made to appellee one principal note, of that date, in that sum of money, maturing in five years, and bearing interest at nine per cent. per annum, payable half-yearly, on the 15th days of September and March of each year, until the principal sum should be fully paid; the installments of

interest being evidenced by ten interest notes made by Bartalott and Barbier to appellee, of even date with the principal note, each for the sum of three hundred and fifteen dollars, payable at semi-annual periods, with interest at ten per cent. per annum, after maturity; that, to secure the payment of this loan, Bartalott and Barbier at the same time, executed to Gallup a trust deed, which was recorded in the recorder's office, on the 25th day of May, 1869, whereby they conveyed to him, as trustee, the land in question, which trust deed empowered the trustee to advertise and sell the land, upon default in payment of the principal or interest of the loan.

The bill also alleged, that, there was due appellee, at the time the bill was exhibited, the whole of the principal sum, together with large arrears of interest, aggregating the sum of $8,200, and that appellee had been compelled to expend large sums of money in keeping the buildings on the land insured, and paying taxes on the mortgaged estate, in order to preserve its security, amounting to forty-five dollars; that appellee had caused the trustee to advertise the land for sale, under the trust deed, for default in payment of the notes secured thereby, but the trustee, learning that Ida Winter Brine, *a minor*, was interested in the equity of redemption under the trust deed, as the heir of the deceased wife of the defendant, George J. Brine, declined to execute the power of sale, so that appellee was without any remedy, save in a court of equity; and that Ida Winter Brine, George J. Brine, Walker and Pearce, claimed some interest in the land as purchasers, or otherwise, which interest was subordinate to the lien of the trust deed.

The bill prayed an account might be taken of the money due appellee on the trust deed and notes, and that a decree might be made for the payment of the amount found due, and for the sale of the mortgaged land, and

that the defendants might be foreclosed of all equity of redemption therein. (Record 2—5.)

On the 12th day of February, 1875, George J. Brine was by the Court appointed guardian *ad litem* for Ida Winter Brine, who was a minor, and, on the 27th day of the same month, he, as such guardian, filed an answer to the bill, in the usual form, alleging she was an infant, and, therefore, submitted her rights and interests to the protection of the Court.

The answer also alleged, that the defendant, Walker, on the 22d day of November, 1870, was the owner in fee of the land described in the bill by purchase from Bartalott and Barbier, and on that day, made a written agreement with Ida R. Brine, for the sale and conveyance thereof to her for the sum of 18,000 dollars, of which sum Ida R. Brine, at the time paid to Walker 5,000 dollars, and the balance thereof, after deducting an incumbrance of seven or eight thousand dollars (as was stated in the written agreement), was to be paid by Ida R. Brine to Walker in one year, with interest at 8 per cent., when Walker agreed to convey the land to Ida R. Brine; that on the day this written agreement was made, Ida R. Brine took possession of the land thereunder, with Walker's consent, and occupied the same as her residence thenceforth to the time of her decease, and since that event Ida Winter Brine has continued in such occupancy thereof; that, within a year after making the written agreement with Walker, Ida R. Brine tendered to Walker the balance of the purchase money specified therein, and demanded of him a conveyance of the land, but he failed to make the same, and, although Ida R. Brine had been thereafter at all times ready and willing to pay such balance to Walker up to the time of her decease, yet he had neglected to convey to her; that Ida R. Brine died on the 8th day of October, 1873, intestate, leaving Ida Winter Brine her only child and

heir-at-law, who thereupon became and was vested with all the interest which her deceased mother had owned in the land under the agreement with Walker, and was entitled to receive from Walker a conveyance thereof on paying the balance of the purchase money, which she was, and, ever since her mother's decease, had been ready and willing to do; that defendant, Pearce, claimed to have a conveyance of the land from Walker, and denied that Ida Winter Brine, had any interest in the land, but that Pearce took his deed from Walker after the written agreement was made by Walker, and possession taken thereunder by Ida R. Brine, and with full notice of the agreement and of the possession of the land under it.

The answer stated, that if on the hearing, the trust deed described in the bill should be found to be a valid lien on the land, then Ida Winter Brine ought in equity to be allowed to redeem the land therefrom, and to hold it discharged from the lien therof. (Record, 9–10.)

At the time this answer was filed, Ida Winter Brine, by her next friend, applied to the Court for leave to file her cross-bill against the appellee, and Walker and Pearce, and thereupon, the original bill and proposed cross-bill were referred to the Master, to examine and report whether the application ought to be granted. (Record, 11–12.)

On the 15th day of March, 1875, Pearce filed his answer to the original bill, wherein he stated that, on the 20th day of February, 1874, Walker conveyed the land to him, and he held the legal title thereto, and was entitled upon a sale thereof under the decree of the Court, and upon payment to appellee of the amount due on the trust deed, to have the balance realized on such sale paid to him. (Record, 12–13.)

The cross-bill, which Ida Winter Brine asked leave to file, stated all of the facts contained in the answer of her guardian *ad litem*, and further stated, that Ida R. Brine,

in her life time, paid all interest falling due on the trust deed up to the time of her decease, and since her decease, Ida Winter Brine had paid all interest thereon up to March 15th, 1874, and would have paid the balance of the interest and all of the principal, had not Walker refused to comply with his agreement, and wrongfully conveyed the land to Pearce; that his conveyance to Pearce was made in fraud of the rights of Ida Winter Brine, and with full knowledge on the part of Pearce of her rights in the land, and of her possession thereof under the agreement with Walker; that Ida R. Brine, within one year of the making of the agreement with Walker, tendered him the balance of the purchase money, and demanded of him a deed, and had been at all times, up to her decease, ready to pay the same, and so had Ida Winter Brine since her mother's decease; but Walker had failed and refused to convey the land to her or her mother, and had finally conveyed the same to Pearce, so as to put it out of his power to comply with his agreement; that Ida Winter Brine and her mother had expended on the land, since making the agreement with Walker, four thousand dollars, and she was still in possession of the land, and ready and willing to carry out the agreement with Walker, and to pay what might be found due on the trust deed, on receiving a conveyance of the land from Walker or Pearce, but that she could not safely pay the trust deed before her right to compel Pearce to convey the land to her had been determined in her favor, in which event, she offered to pay the trust deed and the balance of the purchase money.

The cross-bill prayed for a specific performance of the agreement with Walker, upon payment of the balance of the purchase money due thereon, and that Pearce be compelled to convey the land to Ida Winter Brine, and for leave to redeem the land from the lien of the trust deed, on payment of such sum as the court might find to be due thereon. (Record, 48–50.)

The Master reported, that leave to file the cross-bill should not be allowed, on the ground that "*appellee ought not to be delayed in collecting the trust deed simply to allow complainant in the cross-bill to determine her right to a specific performance, as against Walker and Pearce.*" The Master, however, added, that in his opinion a cross bill, offering to pay appellee or bringing into court the amount *due on the trust deed*, asking an *assignment* thereof, or *subrogation* to the right of appellee thereunder, and praying the same relief against Walker and Pearce ought to be allowed, but there ought to be a distinct offer to pay *immediately* the amount *due on the trust deed.*" (Record, 15, 16.)

To this report exceptions were filed by Ida Winter Brine, which the court overruled, and the application to file the cross-bill was denied, and the cause was referred to the Master on the original bill and answers, to take an account of the amount due on the trust deed. (Record 17–19.)

On the hearing before the Master, appellee offered in evidence the trust deed and the principal note for 7,000 dollars, and one interest note for 315 dollars, both falling due March 15th, 1874. (Record, 21.)

The trust deed by its terms secures the payment of one note for 7,000 dollars, dated March 15th, 1869, due in 5 years, with interest at 9 per cent per annum, payable half-yearly from date until fully paid, which installments of interest (it is stated in the trust deed) are evidenced by 10 interest notes of the same date, each for 315 dollars. (Record, 33–36.)

There is nothing in the trust deed showing that the interest notes bear interest *after maturity*, nor is such interest by the trust deed charged or made a lien on the land. (Record, 33-36.)

The trust deed contains a clause providing that the grantors should keep the buildings on the land insured

during the life of the loan, for the benefit of appellee, *and in default of their so doing*, the trustee might insure and charge the insurance premiums as a lien on the land. (Record, 37.)

Henry Reike testified the amount due April 23d, 1875, on the trust deed and notes, was as follows: Amount due March 15th, 1874, $7000; interest on the same from March 15th, 1874, to April 23d, 1875, 1 year, 1 month and 8 days, at 9 per cent, $696.50; interest note due March 15th, 1874, $315.00; *interest on the same at ten per cent from March 15th, 1874, to April 23d, 1875, $34.82; November 3d, 1874, insurance premium*, $45.00; *interest on the same at 10 per cent. to April 23d*, $2.30. *Total amount due April 23d*, 1875, $8,093.45. (Record, 21–22.)

Mr. Van Every, for appellee, testified he had effected insurance on the buildings at a cost of $30.00, *which was in addition* to the other item for insurance. (Record, 33.)

There was no evidence to prove that the grantors in the trust deed had made default in keeping the buildings insured, at the time these premiums are claimed to have been paid. Mr. Peabody is the only witness who says anything on the subject, and he admits he has no knowledge in reference to the matter. (Record, 23.)

On the 23d day of May, 1875, the Master reported that he had taken proofs of the amount due appellee on the trust deed, and found there was due, *at the date of the report, the sum of* $8,170.24, *manifestly including in his finding the item of* $34.80, *for interest on the interest note after its maturity, and the two items of* $45.00 *and* $30.00, *paid for insurance, and interest on them.* (Record, 20–22, and 33.)

Ida Winter Brine filed exceptions to this report, which the Court overruled, so far as the controversy between her and appellee was concerned, and on June 26th, 1875, the Court entered a final decree in the cause. (Record 44–47.

The decree finds there was due appellee on May 23d,

1875, $8,170.24, with interest thereon at six per cent. from that date (the date of the Master's report), and directs that the same be paid within one hundred days from the entry of the decree, and if not so paid, that the land be sold by the Master, at public vendue, in accordance with the course and practice of the Court. (Record, 46.)

There is no provision in the decree for redemption from the Master's sale, under the statutes of the State of Illinois, in force at the time the trust deed was made, or for the execution of a certificate of purchase by the Master at such sale, but the decree directs the Master to sell, in accordance with the course and practice of the Court, which course and practice is to sell and convey without redemption, and in disregard of the statutes referred to.

ASSIGNMENT OF ERRORS.

The appellant says, the Circuit Court of the United States for the Northern District of Illinois committed error, to her injury and prejudice, in the proceedings, hearing and decree in this cause, in this:

I.

The Court decreed a sale of the land specified in the trust deed described in the bill, without a redemption therefrom, in pursuance of the statutes of the State of Illinois, relating to redemptions in such cases, in force at the time the trust deed was made.

II.

The Court denied the application of appellant for leave to file her cross-bill against appellee, and Walker and Pearce.

III.

The Court confirmed the Master's report of the amount found due on the trust deed, and entered a decree therefor, which decree included $34.82 of interest on the one interest note offered in evidence, the same not being charged on the land by the trust deed; and $45.00 and $30.00 for premiums paid by appellee for insurance, when there was no evidence to show that the grantors in the trust deed had failed to insure, or that appellee was entitled to recover such premiums.

BRIEF OF THE ARGUMENT.

I.

The statute of the State of Illinois, in reference to the right of redemption on foreclosure sales, in force at the time the trust deed was made, is as follows:

"In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgage lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators or grantees, to redeem the same in the manner provided in this chapter for the redemption of lands sold by virtue of executions issued upon judgments at common law, and judgment creditors may redeem lands sold under any such decree in the same mannner as is prescribed for the redemption of lands sold on execution issued upon judgment at common law."

Revised Statutes of Illinois, 1845, p. 305, Sec. 24.

The statute in force in 1845, and since, in reference to redemption of lands sold on execution upon judgments at common law, is as follows:

"Whenever any lands shall be sold by virtue of any execution, it shall be the duty of the sheriff or other officer, instead of executing a deed for the premises sold, to give to the purchaser of such land a certificate in writing, describing the land purchased, the sum paid therefor, and the time when the purchaser will be entitled to a deed for such land, unless the same shall be redeemed, as is provided in this chapter.

"It shall be lawful for any defendant, his heirs, execu-

tors or grantees, whose land shall have been sold by virtue of any execution, within twelve months from such sale, to redeem such land, by paying to the purchaser thereof, his executors, administrators or assigns, or to the sheriff or other officer who sold the same for the benefit of such purchaser, the sum of money paid on the purchase thereof, together with interest thereon at the rate of ten per centum per annum from the time of such sale, and on such sum being paid, as aforesaid, the sale and certificate shall be null and void."

Revised Statutes of Ills., 1845, p. 302, Sec's. 12, and 13.

Sections 14 and 15 of this statute, then provide for redemption by judgment creditors after twelve months, and within fifteen months from the day of sale, and for making a deed to the purchser at the sale at the end of fifteen months from the sale, if there shall be no redemption.

These statutory provisions were passed February 19, 1841.

Session Laws of Ills., 1841, p. 168–171.

Bronson v. *Kinzie*, 1 Howard, 311.

They were in force when the trust deed in question was made, and are still in force.

Gross Statutes of Illinois, 1871, p. 382.

Revised Statutes of Illinois, 1874, p. 623.

The trust deed conveying land in Illinois, the rights which appellee acquired thereby, depend upon the laws of that State, in force at the time the trust deed was made.

Bronson v. *Kinzie*, 1 How., 311–315.

Gantly's Lessee v. *Ewing*, 3 Ibid., 707–717.

McGoon v. *Scales*, 9 Wallace, 23.

Wharton's Conflict of Laws, 273–4.

The laws of Illinois, in force at the time the trust deed was made, created and defined the legal and equitable

obligations of the contract contained in the trust deed, and, if foreclosed by proceedings in court, the foreclosure must be in accordance with such laws.

Bronson v. *Kinzie*, supra, 315.
McCracken v. *Hayward*, 2 How., 612.
Clark v. *Reyburn*, 8 Wallace, 322–3.
Doe v. *Heath*, 7 Blackford, 154.
Sheets v. *Peabody*, Ibid., 613.
Franklin v. *Thurston*, 8 Ibid, 160.
Cargill v. *Power*, 1 Manning, 369.
Malony v. *Fortune*, 14 Iowa, 418.
Scobey v. *Gibson*, 17 Ind., 572.
Bixby v. *Bailey*, 11 Kansas, 368.
Carall v. *Rossiter*, 10 Minn., 174.

Mortgages, or trust deeds, made while the laws above quoted are in force, must be governed by them, and on foreclosure in equity, redemption must be allowed in pursuance thereof: and this is so, whether the foreclosure proceedings are in the State or Federal Courts: because the laws are a part of the mortgage contract, as fully as if set forth in the instrument at length, and their effect is to create a new estate in the mortgaged property in favor of the mortgagor or his grantee, to continue 15 months after the foreclose sale, which no decree of court can take away.

Bronson v. *Kinzie*, 1 Howard, 319–322.
Clark v. *Reyburn*, 8 Wallace, 322.
Farrell v. *Parlier*, 50 Illinois, 275–276.
D' Wolf v. *Haydn*, 24 Ibid, 525–529.
Campbell v. *Vining*, 23 Ibid, 525.

The decree makes no provision for a redemption under the laws of Illinois; but, on the contrary, directs the Master to sell, in pursuance of the course and practice of the court. For years it has been 'the practice in the lower court to sell, without redemption, and to make a deed at once. This court, as a court of review, will

take judicial notice of the course and practice of the lower court in this respect.

Oliver v. *Palmer*, 11 Gill & J. (Md.) 439–40.
Contee v. *Pratt*, 9 Maryland, 67–73.
Newell v. *Newton*, 10 Pick., 472.
March v. *Commonwealth*, 12 B. Monroe, 28.
Chitty v. *Dendy*, 3 Adol. & El., 319.
1 *Greenleaf on Evidence*, Secs. 6 & 6a.
United States v. *Tschmaker*, 22 How. 405.
Romero v. *United States*, 1 Wall, 721.

The question of the right of redemption is not one of mere form. It involves substantial rights. Under the law, as properly administered, the purchaser acquires only a right to a deed and to possession of the land in 15 months from the sale, provided no redemption is made; he acquires *no estate* in the land, but only a conditional right to an estate, while, under this decree, he would at once take both the estate and the possession.

Phillips v. *Demoss*, 14 Illinois, 410.
Martin v. *Judd*, 60 Ibid, 78–82.

The laws of Illinois, giving the right of redemption on foreclosure sales, are *rules of property*, binding upon all who contract with reference to the same, and they will be administered by the Federal Courts, as well as the State Courts, when they are not in conflict with the Constitution or treaties of the United States or laws of Congress.

Bronson v. *Kinzie*, 1 Howard.
Fitch v. *Creighton*, 24 Howard, 159.
Clark v. *Smith*, 13 Peters, 195, 203.
Meade v. *Beale*, Taney's Circuit Court, Dec., 339,360.
Green v. *Lessee of Neal*, 6 Peters, 291.
Shipp v. *Miller*, 2 Wheat., 325.
Thacher v. *Powell*, 6 Ibid, 119.
Parker v. *Overman*, 18 Howard, 137–140.
Lorman v. *Clark*, 2 McClean, 572.

II.

The cross-bill which appellant asked leave to file, was the only means she had of protecting her equity in the land; she could obtain *no affirmative relief on her answer alone*. All she could do by way of answer was to set up her defense to the bill, if she had any, and ask to be dismissed with her costs.

Carnochan v. *Christie*, 11 Wheaton, 446.
Cullom v. *Erwin*, 4 Alabama, 450.
Stone v. *Smoot*, 39 Illinois, 407.
Story's Eq. Pleadings, Sec. 398a.

Walker having conveyed the fee in the land to Pearce, *after* making the agreement to sell with Ida R. Brine, while appellant was in possession of the land as heir of Ida R. Brine, and was not in default, and Pearce having (as the cross-bill avers) full notice of appellant's rights, he took his conveyance, subject to her right to a specific performance, and as a constructive trustee for her, and equity will compel him to convey to her, on performance on her part.

D' Wolf v. *Pratt*, 42 Illinois, 199 and 211.
Perry on Trusts, Vol. 2, Sec. 828.

The controversy between appellant, on one side, and Walker and Pearce, on the other, could not be settled on the original bill and answers thereto. Whenever it is necessary to bring all of the equities of all parties fully before the Court, that complete justice may be done, as well in favor of the defendants, as of the complainant, it is proper to file a cross-bill. The Court will do not only partial justice, but will execute complete justice between all the parties to the cause.

2 Daniels Ch. Pl. and Pr. Sec. 1550.
Story's Eq. Pleadings, Sec. 392.
Wright v. *Miller*, 1 Sandf. ch. 108, 23.
Ballance v. *Underhill*, 3 Scammon, 461.
Jones v. *Smith*, 14 Illinois, 231.

The cross-bill *is germane* to the subject matter of the original bill, although it does not affect the rights of the complainant in the original bill.

Chicago Artesian Co. v. *Insurance Co.* 57 Illinois, 424.

2 Daniels, Ch. Pl. and Pr., 1549, n. 2.

Nelson v. *Dunn*, 15 Alabama, 501.

Morehead v. *Smiley*, 1 Bibb., 313.

It is no answer, that the filing of the cross-bill may delay the relief on the original bill.

Renwick v. *Macomb*, 1 Hopkins, ch. 316.

Duberly v. *Day*, 14 Beavan, 9.

It is no objection to the cross-bill that Walker and Pearce are citizens of the same state as appellant.

Story's Eq: Pleadings, sec. 400.

Railroad Co. v. *Chamberlain*, 6 Wall., 748.

Freeman v. *Howe*, 24 Howard, 450.

III.

The trust deed, which creates the lien on the land, charges on it a note dated March 15th, 1869, for 7,000 dollars, due in 5 years, with interest at 9 per cent. payable half yearly until paid, the installments of interest being evidenced by 10 interest notes of the same date, each for 315 dollars. (Record, 33.)

Nothing is said in the trust deed in reference to the interest notes bearing interest, yet the one in evidence draws interest *after maturity at ten per cent.* (Record, 21–39.)

The trust deed does not charge this interest on the land (Record 33), yet the court allowed it in the decree to the amount of $34.80. (Record, 20, 21, 46.)

This was error. The complainant could have no decree, as against a subsequent purchaser, for more than the trust deed, as made and recorded, charged on the land.

Payne v. *Avery*, 21 Michigan, 524.
Gardner v. *Emerson*, 40 Ill., 297.

The trust deed provides the grantors shall keep the buildings on the land insured, in companies selected by the trustee, for appellee's benefit, and in default of their doing so, the *trustee* might effect the insurance and charge the premiums paid therefor on the land. (Record, 37.)

There is no proof in the record that the grantors failed to insure. Yet the court allowed in the decree $45.00 and $30.00 for premiums paid by *appellee*. (Record, 20, 21–22, 38, 46.)

This was wrong. In the absence of agreement to that effect, if the mortgagee insures the mortgaged premises, the mortgagor is not bound for the cost of the insurance, nor can the estate be charged therewith.

Dobson v. *Land*, 8 Hare, 216.
Bellamy v. *Brickenden*, 2 Johnson & Hemming, 137.
Brooke v. *Stone*, 34 Law Journal, N. S. 251.
3 *Kent's Com.* 376, note c.

And when, as here, the agreement is to repay the premiums on an *express condition*, then, in order to recover, compliance with the condition must be shown. Although the proof is of a negative, the burden is on appellee.

Wharton's Law of Evidence, vol. 1, Secs. 356, 357.
Phillips on Evidence, vol. 1, 689.
Doe v. *Whitehead*, 8 Adol. & El. 571.

The fact that no exception was taken to the Master's report because of the allowance of these improper items of the account, does not preclude appellant from insisting on this allowance as error.

The appellent is an *infant*, and she, or her guardian for

her, can admit or waive nothing. As against her, *strict proof* is required. Even the answer of her guardean may not bind her.

Hitt v. *Ormsbee*, 12 Illinois, 169.
Tuttle v. *Garrett*, 16 Illinois, 354.
Masterson v. *Wiswould*, 18 Illinois, 48.
Quigley v. *Roberts*, 44 Illinois, 503.
Fischer v. *Fischer*, 54 Illinois, 231.
Wright v. *Miller*, 1 Sandf., ch. 108–118.
Mills v. *Dennis*, 3 Johns, ch. 367.

IV.

ARGUMENT.

The question of the right of redemption from the foreclosure sale directed to be made in the decree contained in the record, is the principle one arising in this cause. The statutes of Illinois, in force at the time the trust deed described in the bill was made, provide that the mortgagor, or his grantees, shall be permitted to redeem from the sale, within one year from the making thereof, and judgment creditors shall have three months thereafter to redeem, by paying the purchase money and ten per cent. interest thereon. This is a suit to *foreclose* a mortgage, and not a suit to compel the trustee to execute the power of sale contained in the trust deed. The bill avers that the trustee had declined to execute the power of sale, on account of the fact that appellant is interested in the land as minor heir of her deceased mother, and prays that the "*usual decree*" may be made for the sale of the land, and that the defendants may be *barred and foreclosed* of all equity of redemption in the land: and this is the relief which the Court granted.

The decree is an ordinary decree for the foreclosure of a mortgage, and not for the execution of the power of sale, which the appellee has clearly abandoned.

The question of the effect of the Illinois statute securing the right of redemption from sales of land on foreclosure proceedings had in the Federal Courts in that State, was carefully considered by this Court in *Bronson*

v. *Kinzie*, 1 Howard, 311, which arose on a certificate of division of opinion in the Court below.

There, it appeared that Kinzie made to Bronson, *before the passage of the act*, a mortgage *with a power of sale*, on land in Chicago, to secure the payment of a sum of money. The money becoming due and being unpaid, Bronson filed his bill to foreclose the mortgage in the Federal Court, at Chicago. On the hearing, the Judges were divided in opinion as to whether the decree should direct the Master to sell the land, with the right of redemption as provided by the Illinois statute, passed since the mortgage was made, and the case came to this Court on a certificate of this division of opinion.

The act was held unconstitutional by this Court, in so far as it applied to mortgages made before its passage, as a law impairing the obligation of contracts, but the opinion declares the validity of the act in respect to all mortgages made after its passage, and affirms its applicability to foreclosure sales made under decrees of the Federal Courts, as well as those of the State tribunals.

In that case this Court said: (pages 315–321) "As "concerns the obligation of the contract upon which "this controversy has arisen, they depend upon the laws "of Illinois as they stood at the time the mortgage deed "was executed. The money due was indeed to be paid "in New York. But the mortgage given to secure the "debt was made in Illinois, for real property situated in "that State, and the rights which the mortgagee acquired "in the premises depended upon the laws of that State. "In other words, the existing laws of Illinois created "and defined the legal and equitable obligations of the "mortgage contract.

"According to the settled rules of law and equity in "all of the States whose jurisprudence has been modeled "upon the principles of the common law, the legal title "vested in the complainant upon the failure of the mort-

"gagor to comply with the conditions contained in the "proviso: and, at law, he had a right to sue for and re- "cover the land itself. But, in equity, this legal title is "regarded as a trust estate, to secure the payment of the "money; and, therefore, when the debt is discharged, "there is a resulting trust for the mortgagor. It is upon "this construction of the contract that courts of equity "lend their aid either to the mortgagor or mortgagee, to "enforce their respective rights. The court will, upon "application of the mortgagor, direct the reconveyance "of the property to him upon payment of the money; "and, upon the application of the mortgagee, it will or- "der a sale of the property to discharge the debt. But, "as courts of equity follow the law, they acknowledge "the legal title of the mortgagee, and never deprive him "of his right at law until his debt is paid: and he is en- "titled to the aid of the court to extinguish the equitable "title of the mortgagor, in order that he may obtain the "benefit of his security. For this purpose, it is his "absolute and undoubted right, under an ordinary mort- "gage deed, if the money is not paid at the appointed "day, to go into the Court of Chancery and obtain its "order for the sale of the mortgaged property, free, and "discharged from the equitable interest of the mortgagor. "This is his right by the law of the contract: and it is "the duty of the court to maintain it without any unrea- "sonable delay.

"When this contract was made, no statute had been "passed by the State changing the rules of law or equity "in relation to a contract of this kind, and it must, "therefore, be governed, and the rights of the parties "under it measured by the rules above stated. They "were the laws of Illinois at the time, and, therefore, en- "tered into the contract, and formed a part of it without "any express stipulation to that effect in the deed. Thus, "for example, there is no covenant in the instrument

"giving the mortgagor the right to redeem, by paying "the purchase money after the day limited in the deed, "and before foreclosed by a decree of the Court of "Chancery. Yet, no one doubts his right or his remedy; "for, by the laws of the State then in force, this "right and this remedy were a part of the laws of "the contract, without any express agreement of the "parties. So, also, the rights of the mortgagee, as "known to the laws, required no express stipulation to "define or secure them. They were annexed to the con- "tract at the time it was made, and formed a part of it; "and any subsequent law impairing the rights thus ac- "acquired, impairs the obligations which the contract "imposed. * * * * As concerns the law of Feb- "ruary 19, 1841, it appears to the Court not to act mere- "ly on the remedy, but directly on the contract itself, and "to engraft upon it new conditions injurious and unjust "to the mortgagee. It declares that, although the "mortgaged premises should be sold under the decree "of the Court of Chancery, yet the equitable estate of "the mortgagor shall not be extinguished, but shall con- "continue for twelve months after the sale. And "it moreover gives a new and like estate which be- "before had no existence, to the judgment creditor, to "continue for fifteen months. * * This law gives to "the mortgagor and to the judgment creditor an equit- "able estate in the premises, which neither of them "would have been entitled to under the original contract; "and these new interests are directly and materially in "conflict with those which the mortgagee acquired when "the mortgage was made. Mortgages made since the "passage of those laws must undoubtedly be governed "by them; for every State has the power to prescribe the "legal and equitable obligations of a contract to be made "and executed within its jurisdiction. It may exempt "any property it thinks proper from sale for the pay-

"ment of a debt, and may impose such conditions and "restrictions upon the creditor as its judgment and "policy may dictate. And all future contracts would be "subject to such provisions, and they would be obligatory "on the parties in the courts of the United States, as "well as in those of the State."

In *Clark* v. *Reyburn*, 8 Wallace, 318, this Court reversed a decree of foreclosure, because the decree did not direct a foreclosure in pursuance of the law of the State of Kansas (where the mortgaged land was,), in force when the mortgage was made.

The Court there uses this language:

"In this country, the proceeding in most of the States, "and perhaps in all of them, is regulated by statute. "*The remedy thus provided, where the mortgage is executed,* "*enters into the convention of the parties,* in so far as that "any change by legislative authority which affects it "substantially, to the injury of the mortgagee, is held to "be a law impairing the obligation of the contract within "the meaning of the provision of the Constitution on "that subject."

Bronson v. *Kinzie* has been affirmed by this Court in numerous instances, and has repeatedly been recognized as authority by the State courts.

It is said by this Court in *Gantly's Lessee*, v. *Ewing*, 3 Howard, 717: "This court held, in *Bronson* v. *Kinzie*, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State, when it was made."

In *McCracken* v. *Hayward*, 2 How., 612, it is said: "The obligation of a contract consists in the binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, as forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other."

And again, on page 613, "The obligation of the con-
"tract between the parties in this case was to perform
"the promises contained therein; the right of the plaintiff
"was to damages for the breach thereof, to bring suit and
"and obtain judgment, to take out and prosecute an ex-
"ecution against the defendant till the judgment was
"satisfied, pursuant to the existing laws of Illinois.
"These laws, giving these rights, were as perfectly bind-
"ing on the defendant, and as much a part of the con-
"tract as if they had been set forth in its stipulations in
" the very words of the law relating to judgments and
"executions."

And, to quote from another case, "It is also settled
"that the laws which subsist at the time and place of the
" making of a contract, and where it is to be performed, en-
"ter into and form a part of it, as if they were expressly
"referred to, or incorporated in its terms. This princi-
"ple embraces alike those which affect its validity,
" construction, discharge and *enforcement*."

Von Hoffman v. *Quincy*, 4 Wall., 550.

To the same effect are many other cases in the Federal and State courts.

Ex parte Christy, 3 How, 228.
Howard v. *Bugbee*, 24 How, 461.
Cargill v. *Power*, 1 Manning, 369.
Malony v. *Fortune*, 14 Iowa, 418.
Scobey v. *Gibson*, 17 Indiana, 572.
Bixby v. *Bailey*, 11 Kansas, 368.
Caroll v. *Rossiter*, 10 Minn., 174.

"It is a principle, too firmly settled to admit of dis-
"pute at this day, that to the law of the State in which
"land is situated must we look for the rules which gov-
"ern its descent, alienation and transfer, and for the
"effect and construction of conveyances."

McGoon v. *Scales*, 9 Wall., 27.
Bronson v. *Kinzie*, *supra*.

Wharton's Conflict of Laws, 273–4.

We do not contend that the Legislature of Illinois can *regulate the practice* of the Federal Courts sitting within its limits. The laws of Illinois giving redemption from foreclosure sales *are not rules of practice, but rules of property, binding alike on all who deal with the thing*, and the uniform decision of the courts of Illinois is, that decrees denying the right of redemption, or failing to recognize it, are in violation of those *rules of property*, and, therefore, erroneous.

Farrell v. *Parlier*, 50 Illinois, 275–6.
D' Wolf v. *Hayden*, 24 Ibid., 525-9.
Campbell v. *Ewing*, 23 Ibid., 525.

The Federal courts sitting in Illinois will administer these laws in cases where they apply. Such is the conclusion to be derived from the repeated decisions of this court. In *Clark* v. *Smith*, 13 Peters, 203–4, it is said:

"The state legislatures have no authority to prescribe "the forms or modes of proceeding in the Courts of the "United States; but having created a right, and at the "same time prescribed the remedy to enforce it, if the "remedy prescribed is substantially consistent with the "ordinary modes of proceeding on the chancery side of "the Federal Courts, no reason exists why it should "not be pursued in the same form as in the State courts. "On the contrary, propriety and convenience suggest "that the practice should not materially differ where the "titles to lands are the subjects of investigation. And "such is the constant course of the Federal Courts.

"In the State of Tennessee the legislature has provi-"ded that courts of equity may divest a title, and vest "it in another party to a suit, and that the decree shall "operate as a legal conveyance. In Kentucky the legis-"lature has declared that Courts may appoint a commis-"sioner to convey as attorney in fact of litigant parties, "and such deed shall pass the title. The Federal Courts

"in the states referred to, have adopted the same practice "for years. It may be said, with truth, that this is a mode "of conveyance which the states have the exclusive right "to regulate. The undoubted truth is, that when investi- "gating and decreeing on titles in this country, we must "deal with them as we find them, and accommodate our "modes of proceeding in a considerable degree to the "nature of the case, and the character of the equities in- "volved in the controversy, so as to give effect to state "legislation and state policy, not departing, however, "from what legitimately belongs to the practice of a "Court of Chancery. Kentucky has the undoubted power "to regulate and protect individual rights to her soil, "and to declare what shall form a cloud on titles; and "having so declared, the Courts of the United States, by "removing such clouds, are only applying an old prac- "tice to a new equity created by the legislature having "its origin in the peculiar condition of the country.

In *Green* v. *Lessee of Neal*, 6 Peters, 298, is found lan- guage even more emphatic: "The statute laws of the "States must furnish the rule of decision to the federal "Courts, as far as they comport with the constitution in "all cases arising within the respective States. * * "This Court adopts the local law of real property as "ascertained by the decisions of the State Courts, where "they are grounded on the construction of the statutes "of the State, or form a part of the unwritten law of the "State, which has become a fixed rule of property. In "a great majority of causes before the Federal tribunals, "they are called to enforce the laws of the State. The "inquiry is, what is the settled law of the State at the "time the decision is made? This constitutes the rule "of property within the State, by which the right of "parties litigant must be determined."

Numerous other cases in this Court may be cited in support of this same principle.

Shipp v. *Miller*, 2 Wheat, 325.
Thacher v. *Powell*, 6 Ibid, 119.
Emeldorf v. *Taylor*, 10 Ibid, 152.
Packer v. *Overman*, 18 How., 140.
Fitch v. *Creighton*, 24 How., 162.

In *Bronson* v. *Kinzie*, 1 Howard, 321, this Court declared, in reference to this very statute: "*Mortgages* "*made since the passage of these laws must undoubtedly be* "*governed by them; for every State has the power to prescribe* "*the legal and equitable obligations of a contract to be made* "*and executed within its jurisdiction. It may exempt any* "*property it thinks proper from sale for payment of a debt, and* "*may impose such conditions and restrictions upon the creditor* "*as its judgment and policy may dictate. And all future con-* "*tracts would be subject to such provisions, and they would be* "*obligatory upon the parties in the courts of the United States,* "*as well as in those of the State.*"

Indeed, if the statutes giving this right of redemption *enter into the mortgage contract*, as the cases in 1 Howard and 8 Wallace expressly hold, then there is no possible escape from the conclusion, that the Court below is bound to allow it: for it is this very mortgage contract which the Court is called upon to *enforce*, and certainly it cannot rightly violate one of its most important and material elements, as it would do, by denying this right, which the contract reserves to the mortgagor and his grantee.

In *Lorman* v. *Clarke*, 2 McClean, 572, the principle for which we contend is stated by Judge McClean thus:

"The Judiciary of the United States constitutes a co-
"ordinate and independent branch of the government;
"and its powers are co-extensive with the laws. It was
"designed, undoubtedly, to secure a uniform construc-
"tion and enforcement of the laws of the Union. And,
"in this respect, in all the States, the rule of decision is
"unvaried. But the Federal Court has jurisdiction be-
"tween citizens of different States, as well as in cases

"arising under the laws of the United States. And when "controversies are brought before it, which do not arise "under the laws of the Union, by what law are they to "be determined? The law of the contract is the law of "the place where it was made and is to be executed. "*There is no unwritten or common law of the Union. This "rule of action is found in the different States, as it may have "been adopted and modified by legislation, and a course of "judicial decisions. The rule of decision, then, must be "found in the local law, written and unwritten.* No foreign "principle attaches to the Federal Court when exercising "its powers within a State. *It gives effect to the local law "under which the contract was made, or by virtue of which the "right is asserted. And this is so independently of any act of "Congress adopting the modes of proceeding at common law "of the State Courts. And the principle applies as well to "proceedings in chancery as at law.*

"*If a local law or usage originate a new right, it will be "enforced by the Courts of the United States, sitting within "the State, by the exercise of a common law or chancery power, "as the case may require.*"

The jurisdiction of the Court below depends wholly on the citizenship of the parties: not on the subject matter of the suit.

By a fiction of law, the appellee is a citizen of the State of Connecticut, and the appellant is a citizen of Illinois: *therefore*, the Court below had jurisdiction of this cause. But what is the subject matter of the suit? We answer, the mortgage contract. What was appellee's right in respect to that contract, and what did appellee seek to do by its suit? We answer: to enforce the mortgage contract according to the law of Illinois at the time it was made. That law is a part of the contract, or else the decisions of the Courts, extending over a period of more than thirty years, are wrong. Can the Federal Court split this contract in two: execute a part of it, and

violate the rest? Does the mortgage contract mean one thing in the Federal Court, and a different thing in the State Court?

The rule providing for a sale, without redemption, was a rule of the common law. That rule of the common law is repealed in Illinois; was repealed when the mortgage in question was made, and the statute allowing redemption was and is in force.

The United States has no common law. The nature and effect of the mortgage contract are matters of State regulation and concern, and do not come within any power delegated to the General Government by the Constitution. The Federal Courts sitting in the State of Illinois, in causes between citizens of different States, involving contracts respecting lands in that State, necessarily execute the laws of Illinois. Those laws are the full and only measure of the rights of the parties: they inhere in the contract and are part and parcel of it: they constitute the rule of property, binding on the parties to the contract, and all who claim under them.

It will probably be contended by counsel for appellee that the decree in the record does not deny the right of redemption which we assert. But it will not be disputed that the "course and practice" of the court below, according to which the decree directs the sale to be made, is to sell without redemption. Such in fact has been the course and practice in the court below for years. Under this decree, if not reversed, the Master will sell the land and execute a deed at once, and the right of redemption will be cut off. Appellant's only alternative was in this appeal. This court will take judicial notice of the course and practice of the inferior court, and will find it as we have stated.

All of the cases so decide, and we need not quote them at length.

Chitty v. *Dendy*, 3 Adol. & E., 319.

March v. *Commonwealth*, 12 B. Monroe, 28.
Contee v. *Pratt*, 9 Maryland, 67–73.
Oliver v. *Palmer*, 11 Gill & J., 439–401.
Newell v. *Newton*, 10 Pick., 472.
1 *Greenleaf on Ev.*, Secs. 6 & 6a.
Romero v. *United States*, 1 Wall. 721.
United States v. *Teschmaker*, 22 How., 405.

More than this, the decree is the warrant of attorney to the Master; it directs him what to do, and ought to direct him how to do it. If it was designed to allow the right of redemption the decree would so state, and as it does not, the only just conclusion is, that the sale is to be made without it.

II.

We insist the court erred in denying appellant leave to file her cross bill against appellee, Walker and Pearce.

After the trust deed was made, Walker obtained title to the land, and agreed to convey it to the mother of appellant for a certain sum of money. Of this money appellant's mother paid five thousand dollars to Walker at the time, and she was at once let into possession by him. Appellant's mother died in October, 1873, leaving her, a child of from 2 to 3 years of age, her sole heir. Possession of the land as a residence was continued by appelpellant's mother up to the time of her death, and afterwards was continued by appellant up to the time of asking leave to file her cross-bill. Appellant's mother had, within the time provided in the agreement with Walker, tendered to him the balance of the purchase money and demanded of him a deed of the land, but Walker had refused to make the deed, and she had ever since to the time of her death been ready and willing, and since her death appellant, as her sole heir, had been ready and willing to pay the balance of the purchase money on receiving a deed.

These facts are all properly averred in the cross-bill, and that they show a proper case for a specific performance, no one will deny. It would be useless to cite authorities in support of the proposition. On the 15th of February, 1874, Walker quit-claimed the land to Pearce, and since that time Pearce has claimed the land to appellant. The cross-bill avers that Pearce, at the time Walker conveyed to him, had full notice of the agreement by Walker, and of the rights of appellant in the land. The cross-bill offers to pay the balance due on the agreement, and to pay what may be found due to appellee on the trust deed, when it may be determined by the Court that appellant is entitled to a specific performance of the agreement, for which it specifically prays. These averments are to be taken as true, for the purpose of determining the question now before the Court; and that they make out a case for relief as against Walker and Pearce, there can be no doubt.

Pearce, having notice of appellant's equities, will be treated as a constructive trustee by a court of equity, and as such decreed to convey to appellant, just as Walker would be.

D'Wolf v. *Pratt*, 42 Ill., 199-211.
Percy on Trusts, Vol. 2, sec. 828.

Could appellant assert her right to a specific performance by a cross-bill? We insist that she could, and that the case made by her cross-bill comes within the ordinary rules which govern Courts of Chancery in such matters. Judge Story thus states the practice in such cases:

"It frequently happens, and particularly if any ques-
"tion arises between two defendants to a bill, that the
"Court cannot make a *complete decree*, without a cross-
"bill, to bring every matter in dispute completely before
"the court, to be litigated by the proper parties, and
"upon proper proofs. In such a case, it becomes neces-
"sary for some one or more of the defendants to the orig-

"inal bill to file a cross-bill against the plaintiff, and "some or all of the defendants in that bill, and thus to "bring the litigated points fully before the Court.

Story Eq. Pleadings, sec. 392.

And again he says:

"Upon a hearing of a cause, it sometimes happens "that the suit already instituted is insufficient to bring "before the Court all matters necessary to enable it fully "to decide upon all the rights of all the parties. This "most commonly happens where persons in opposite in- "terests are co-defendants, so that the Court cannot de- "termine their opposite interests upon the bill already "filed, and yet the determination of their interests is "necessary to a complete decree upon the subject matter "of the suit. In such a case the Court will direct a cross- "bill to be filed in order to bring all the rights of all the "parties fully and properly before the Court for deci- "sion." Ibid, 396.

"A cross bill is proper whenever the defendants, or "any of them, have equities arising out of the subject "matter of the original suit, which entitle them to "affirmative relief, which they cannot obtain in that "suit."

Jones v. *Smith*, 14 Ills., 231.

2 Daniels, Ch. Pl. and Pr., 1548–1550.

The appellant could obtain no affirmative relief on her answer alone, yet that she was entitled to affirmative relief by way of a specific performance of the agreement with Walker, is too clear for argument.

Cullum v. *Erwin*, 4 Alabama, 450.

Cornochan v. *Christie*, 11 Wheat. 446.

Ballance v. *Underhill*, 3 Scam. 461.

The position taken by appellee on this question is this: Let the appellant pay the amount due on the trust deed, and then it will be in order to file the cross-bill, but the complainant in the original bill ought not to be

delayed in obtaining relief by litigation between appellant and others, in which litigation it has no real interest. But it is not true that courts of equity allow a defendant to file a cross bill only when the complainant in the original bill is interested in the litigation on the cross-bill. The controversy arising on the cross-bill may arise solely between co-defendants.

Chicago Well Co. v. *Ins. Co.*, 57 Ills., 424.
Adams' Equity, side pages 402–403.
Talbot v. *McGee*, 4 T. B. Monroe, 375.
Morehead v. *Smiley*, 1 Bibb., 313.
Chicago Well Co v. *Insurance Co.*, 57 Ills. 424.

While it is true that the cross-bill must *relate to the subject matter* of the original bill, it need not be confined to the issues of the original bill.

Nelson v. *Dunn*, 15 Ala., 201.
Hurd v. *Case*, 32 Ills., 49.
Chicago Mill Co. v. *Ins. Co.*, 57 Ills., 424.

Where there is a controversy between the defendants in a foreclosure suit as to the right of redemption, the Court will determine such controversy before it will permit the foreclosure so be made.

Duberly v. *Day*, 14 Beavan, 9.
Renwick v. *Macomb*, 1 Hopkins, Ch. 316.

In the case last cited, a motion was made by the complainant to have the Master report separately as to the amount due on his mortgage, so as to avoid the delay caused by the litigation between co-defendants respecting the equity of redemption. The motion was refused by the Chancellor, who said: "The delay which this complainant suffers is common to this and all other like cases."

There is no averment in the original bill that the premises are an inadequate security for the mortgage debt. This being so, the application to file the cross-bill was relieved from the objection of probable injury to the rights of appellee.

Renwick v. *Macomb*, supra.

It is obvious that appellant ought not to be compelled to discharge th trust deed *as a condition* to her right to file a cross-bill. Her title to the land has been imperiled by the wrongful conveyance of it by Walker to Pearce. The *discharge* of the mortgage before Pearce is made to convey to appellant, would leave in Pearce the full title to the land clear of the incumbrance, although Pearce is a *mala fide* purchaser, and has no right to the land. Why compel appellant (who is an infant, entitled to the care and protection of the Court of Chancery, as respects her inheritance) to hazard the amount of this incumbrance in the uncertainties of future litigation, before allowing her to assert her rights by cross-bill? Would it not be much more in accordance with the spirit of equity, whose function it is to do full and complete justice to all the parties before the court, to permit appellant to assert her right to the land by her cross-suit, and then to redeem her estate from whatever lien appellee may hold against it?

There can be but one answer to this question. A mortgagee is entitled to a foreclosure. A vendee, or the heir of a vendee, who is in no default, is entitled to a specific performance, and to a conveyance from a purchaser with notice. Both are equitable remedies: neither is preferred over the other: the mortgagee, asking equity, must be willing to do equity: if by granting him relief *at once*, other rights are sacrificed, the court of conscience, to which he resorts, must stay its arm until others equally entitled to justice may be heard.

III.

We shall be very brief in reference to the third assignment of error. The court allowed in the decree interest on the interest note, while the trust deed did not make such interest a charge on the land. It hardly needs any

authority to demonstrate that this is erroneous. A simple indebtedness, evidenced by a note, is of itself no lien on land. So there is no right to include this item in the decree, even as against the makers of the trust deed.

But as against appellant, who stands in the shoes of a *bona fide* purchaser, there is a manifest injustice in this respect.

The trust deed was recorded. As against a purchaser, the mortgagee can prove for only so much as the recorded mortgage shows there is charged on the land. This rule is so manifest that we need not trouble the court with a quotation from decided cases.

Payne v. *Avery*, 21 Michigan, 524.

Gardner v. *Emerson*, 40 Ills., 297.

The court allowed in the decree two items of $45.00 and $30.00, and interest, for premiums paid by appellee for insurance of the buildings on the mortgaged land. This was done apparently under the provisions of the trust deed, to the effect that the grantors should keep the buildings insured in companies selected by appellee and for appellee's benefit, and if the grantors should fail to do this, then the trustee might insure, and the premiums paid by him should be a charge on the land. No proof was made that the grantors had failed to insure, although on the hearing before the Master appellant objected to the allowance of these items, unless such proof were made.

The right of appellee to charge the land with these premiums expressly resting on the contingency of the grantors failing to insure, the burden was on appellee to prove that they had so failed before this claim could be admitted. Appellee was bound to make out its own case. The means of proof were in its own possession, if the claims it advanced were well founded.

"The true solution of the question (of the burden of

"proof) is, that he who in a court of justice undertakes "to establish a claim against another, or to set up a "release from another's claim against himself, must pro- "duce the proof necessary to make good his contention. "This proof may be either affirmative or negative. "Whatever it is, it must be produced by the party who "seeks forensically either to establish or defeat a claim. "It makes no difference, therefore, whether the actor is "plaintiff or defendant, so far as concerns the burden "of proof. If he undertake to make out a case, whether "affirmative or negative, this case must be made out by "him, or judgment will go against him."

Wharton's Law of Ev., Vol. 1, secs. 356, 357.
Phillipps on Evidence, Vol. 1, 689.
Doe v. *Whitehead*, 8 Adol. & El., 571.

The appellee, as mortgagee, has no lawful claim for these premiums, in the absence of an agreement providing for their repayment. Where no such agreement exists, the mortgagee is considered as insuring for his own benefit, and at his own cost. The cases cited in our brief establish this principle beyond question.

The appellant, being an infant, is not precluded from alleging error in the accounts, by not setting the error up in her exceptions to the Master's report. She could waive nothing by not raising objection at the time, nor could her guardian do it for her.

"No *laches* can be imputed to an infant, and no valid "decree can be made against him, merely by default. "The plaintiff, in every case ought to prove his demand.

"The infant is not bound by his answer; it cannot be "read against him, and no decree can be made on the "admission of facts which it contains."

"When there are infant defendants, and it is neces- "sary, in order to entitle the complainant to relief, that "certain facts should be before the Court, such facts, "although they might be the subject of admission on

"the part of adults, must be proved against the infants."

Wright v. *Miller*, 1 Sandf. Ch., 118.

This is the general rule of Courts of Chancery.

Hitt v. *Ormsbee*, 12 Ills., 169.

Tuttle v. *Gonett*, 16 Ibid, 354.

Martman v. *Minould*, 18 Ibid, 48.

If the express admission of the infant, or his guardian, *ad litem*, will not bind him, it is impossible that his mere omission to take exception to the account should have that effect.

Respectfully submitted,

Francis Adriance
Sols for Applt

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 279.

IDA W. BRINE

vs.

THE HARTFORD FIRE INSURANCE COMPANY,

APPELLEE.

REPLY BY MELVILLE W. FULLER TO BRIEF OF MR. ISHAM, FOR APPELLEE.

Judd & Detweiler, Prs., Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1877.

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IDA WALTER BRINE, APPELLANT,

vs.

THE HARTFORD FIRE INSURANCE CO., APPELLEE.

REPLY FOR APPELLANT TO BRIEF OF MR. ISHAM, FOR APPELLEE.

May it please your Honors:

The brief of Mr. Isham, filed herein on appellee's behalf, is addressed to a single point, namely, the error first assigned, that the Court decreed a sale without redemption, notwithstanding the statute of Illinois providing therefor.

The decree directed that the sale should be made "in accordance with the course and practice" of the Court, if payment of the amount found due were not made within one hundred days from the date of the entry thereof.

It is conceded by appellee that this Court will take judicial notice of the course of practice of the court below, and that it is such course and practice to make sales absolute and without redemption. The decree is to be treated, therefore, as if it had *in terms* prescribed such absolute sale, and as repeated decisions of the highest judicial tribunal of Illinois have determined such a decree to be erroneous, (*Rhinehart* vs. *Stevenson*, 23 Illinois, 524; *Farrell* vs. *Parlier*, 50 Ill.,

274; *D' Wolf* vs. *Haydn*, 24 Ill., 525,) it would seem to follow that the decree in the case at bar must be reversed.

No principle is better settled than that in relation to immovables the law of their situs governs. (*Wharton on Conflict Laws*, § 273 *et seq.*) To the law of the State in which land is situated, "must we look for the rules which govern its descent, alienation, and transfer."

McGoon vs. *Scales*, 9 Wallace, 27.

"The statute laws of the States must furnish the rule of decision to the Federal courts, as far as they comport with the constitution, in all cases arising within the respective States. * * This Court adopts the local law of real property as ascertained by the decisions of the State courts, where they are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which has become a fixed rule of property. In a great majority of causes before the Federal tribunals, they are called to enforce the laws of the State. *The inquiry is, what is the settled law of the State at the time the decision is made?* This constitutes *the rule of property* within the State, by which the right of the parties litigant must be determined."

Green vs. *Lessee of Neal*, 6 Peters, 298.
(And cases cited in appellant's brief, pp. 24, 25, 26.)

It would be singularly anomalous if this were not so, for rules of property are of universal obligation, and the law of the locality is the law of the case.

The bill of complaint is the ordinary bill to foreclose a mortgage by sale, and the trust deed which is sought to be so foreclosed was given on the 15th day of March, A. D., 1869.

By the statutes of Illinois, as they have existed since 1841, it is provided that it shall be lawful for any defendant, his heirs, executors or grantees, whose land shall have been sold by virtue of any execution, within twelve months from such sale, to redeem such land by paying to the purchaser, &c., or the sheriff, or other officer, &c., the money paid on

the purchase and ten per cent. interest, and that judgment creditors may redeem within fifteen months. And it is also provided, (and has been since 1841,) that in all cases where lands shall be sold under or by virtue of *any decree of a court of equity* for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, grantees, &c., to redeem the same in the manner prescribed for redemption from sales on execution, and for judgment creditors to do likewise.

These provisions of the statute are set forth on pp. 10 and 11 of appellant's brief, hereinbefore filed.

Rev. Stat. Ill., 1845, pp. 302, 305, chap. 57, §§ 12, 13, 14, 15, 24.
Session Laws Ill., 1841, pp. 168–171.
Gross' Statutes Ill., 1871, p. 382.
Rev. Stat. Ill., 1874, Chap. 77, §§ 16, 18, p. 596.

In the absence of statutory provisions, courts of equity may allow a period of redemption before a sale of the property, according to the circumstances of the case. This is always done in cases of strict foreclosure, where the decree vests the complete title in the mortgagee. *Perrine* vs. *Dunn*, 4 Johns. Ch., 140. The length of time is within the discretion of the court, but the discretion does not extend to withholding it entirely—*Clark* vs. *Reyburn*, 8 Wall., 318. But where the decree goes for a sale of the property, it has been considered that the debtor is sufficiently protected by the right to receive the surplus, though some courts apply the rule to such cases.

The right of redemption recognized in courts of equity continues until barred by lapse of time, by strict foreclosure, or by judicial sale. In Illinois it is held to be cut off by a sale under decree to pay the debt, as by the sale the land is converted into money and applied to the mortgage debt and the surplus, if any, is paid to the mortgagor.

Weiner vs. *Hintz*, 17 Ill., 262.

Strict foreclosures are also allowed upon allegations and proof of the insolvency of the mortgagor *and* inadequacy of the security, and where the mortgagee is willing to take the property and discharge the debt. But they are held not to be proper where there are other incumbrances or creditors, or purchasers of the equity of redemption.

Farrell vs. *Parlier*, 50 Ill., 274.

The bill in this case is not one for a strict foreclosure. There is neither averment nor proof to justify a decree of that character. It is simply a bill for foreclosure by sale and such is the decree. And while by sale, what is known in the equity courts as the equity of redemption might be barred, this is not true, but the contrary, so far as the redemption provided for by the statute, is concerned.

At a sale upon execution at law or decree, the purchaser acquires no title. He obtains, says the Court, (in *Phillips* vs. *Demoss*, 14 Illinois, 412,) the alternative right "either to receive the redemption money, which might be paid to the sheriff by the judgment debtors, should they redeem within twelve months, or which might be paid by any junior judgment creditor after the expiration of the twelve months and before the expiration of fifteen months; or in case no such redemption should be made either by the judgment debtors or by a judgment creditor, then to a sheriff's deed. By his purchase he acquired *no title to the land, either legal or equitable.*

"His right to the land was no higher or more sacred than it was to the redemption money. When he purchased, knowing that he must either get his purchase money back again with ten per cent. upon it within fifteen months, or get the land, he was aware that *others and not himself*, had the right to say which he would take. This was the alternative character of his investment. He knew that either the judgment debtor or any judgment creditor might determine that he should take the redemption money instead of the land, and by such determination he was bound by the terms

of the law under which he purchased. In view of this he made his bids. *The policy of the law is to encourage these redemptions*, rather than to suppress them."

And this case is followed and approved in

Martin vs. *Judd*, 60 Ill., 81.

Karnes vs. *Lloyd*, 52 Ill., 113.

Here, then, is a rule of property defined by statute. It is unnecessary to resort to construction or judicial decision. The language is plain, precise, and definite, and for more than thirty-six years this statute has been applied in practice and enforced by the courts. It existed when the mortgage in this case was executed, and entered into the convention of the parties. It was passed in the legitimate exercise, by the State of Illinois, of its power in that regard.

"Every State," says Chief Justice Taney, (*Bronson* vs. *Kinzie*, 1 Howard, 311,) "has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. *It may exempt any property* it thinks proper from sale for the payment of a debt, and may impose such conditions and restrictions upon the creditors as its judgment and policy may dictate. And all future contracts would be subject to such provisions, and they *would be obligatory upon the parties in the courts of the United States* as well as in those of this State."

Clark vs. *Reyburn*, 8 Wall., 322.

How, then, can it be reasonably contended that this rule of property can be overthrown by the course and practice of the United States circuit court for the northern district of Illinois?

It is said that, by the act of 1828, the power of prescribing the mode of executing their decrees in equity by rules is vested in the United States courts, and that it is in their discretion whether final process therein shall be changed to conform to changes adopted by State Legislatures for State

courts. And it is argued that the right of redemption provided for by statute is merely a regulation of the conduct of the officer in executing the decree, and that since the act of 1841 has not been adopted by the United States courts in Illinois, it is of no effect in those courts.

If this were true, then the proviso of the third section of the act of 1828 ought to be construed as mandatory and not directory, for the discretion is but a legal discretion after all. But it is not true. The statute creates a rule of property. That rule is of universal obligation, and furnishes the rule of decision for the United States as well as the State courts. If the United States courts have not adopted such rules of practice as enable them to secure to the party the benefit of the law in the exact manner in which that result would be reached in the State courts, nevertheless the right remains, and can neither be impaired nor denied because of such inability, but will be protected by the Federal courts to the same extent, even though by a different mode.

This is pointed out by Chief Justice MARSHALL in *Bank of Hamilton* vs. *Dudley's Lessee*, 2 Peters, 525, a case arising under the occupying claimant law of Ohio, which was held to be *a rule of property and decision* in the Federal courts, and as such to be carried *into effect*, though the particular mode provided for by the statute could not be in that instance pursued.

The homestead laws of the several States afford a familiar illustration. The owner of the homestead is protected therein by the United States courts, irrespective of whether the practice prescribed by the State statutes of setting off the homestead through the instrumentality of a jury or special commissioners has been adopted by rule of court or not.

So as to a decree upon a bill to foreclose, it is impossible to understand why the reservation therein that the sale is subject to the statutory redemption, as in the nature of things it necessarily must be, amounts to such a change in

the execution of final process as to need a formal adoption of a rule of court to justify it. In no reasonable aspect is an exemption or a right of redemption a regulation of final process on the part of the State. It has not been so considered in relation to the homestead law, and it is equally plain that it is not so in relation to redemptions.

The argument for appellee is: Congress has exclusive power to regulate final process in the Federal courts; a decree is final process; therefore Congress may empower the Federal courts to disregard the local law entirely. But the error here is in confounding rules of property with modes of practice, and in insisting that because the mode of procedure in the United States court may differ from that in the State court, *therefore* the absolute rights of parties may be secured in the one tribunal and not in the other.

To concede the statutory right of redemption in no way disturbs the final process of the Federal courts. The master sells upon such notice, at such time, and subject to such regulations as may be according to usage. He may even give a deed, instead of the certificate prescribed by the State law, but his conveyance cannot transfer the title. What the purchaser gets is the alternative right to the redemption money or the land, and this is all he can get if the rules of property in the State are to be regarded. To hold otherwise is to deny to the States the power of exemption, of prescribing the legal and equitable obligations of contracts to be made and executed within the State jurisdiction, and of establishing rules of property at all. That result could only be reached by an assumption of power in the General Government not delegated by the Constitution, and no such assumption has ever received the slightest countenance in this Court.

"There is no unwritten or common law of the Union. This rule of action is found in the different States, as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision, then, must be

found in the local law, written and unwritten. No foreign principle attaches to the Federal court when exercising its powers within a State. It gives effect to the local law under which the contract was made, or by virtue of which the right is asserted. *And this is so independently of any act of Congress adopting the modes of proceeding at common law of the State courts. And the principle applies as well to proceedings in chancery as at law.*

"*If a local law or usage originate a new right, it will be enforced by the courts of the United States, sitting within the State, by the exercise of a common law or chancery power, as the case may require.*"

Lorman vs. *Clarke*, 2 McLean, 572.

As forcibly put by Mr. Riddle, (Brief, p. 27,) the subject-matter of the suit at bar is the mortgage contract. The right of the appellee was to enforce that contract according to the laws of Illinois at the time it was made. Those laws inhere in and are part and parcel of the contract, and furnish the measure of the rights of the parties. They cannot be disregarded, but must be enforced as constituting rules of property binding on the parties. The mortgage contract cannot mean one thing in the Federal courts, and a different thing in the State courts, and it cannot be executed in parcels. The accident of citizenship may give the Federal court jurisdiction, but its jurisdiction over the subject-matter is simply the power to enforce the contract according to the law *rei sitae*. It is conceded that the effect and operation of the decree as entered is to cut off the statutory redemption, and decrees have been repeatedly reversed in Illinois upon that ground alone.

It is true, as remarked in *De Wolf* vs. *Hayden*, 24 Illinois, 529, that the right of redemption from judicial sales is a statutory right, *and no decree of a court can take it away*, but the error in a decree making such attempt is none the less an error because impotent to effect the purpose.

Appellant is entitled to have the right of redemption preserved *ex facie* the decree, and is not to be forced to a

bill to redeem where the law gives him the absolute right of redemption by payment simply of the money.

Nor is the argument *ab inconvenienti*, which is twice urged in Mr. Isham's brief, entitled to any weight in the determination of this question

The law being plain, the court has nothing to do with the consequences of its declaration. But it is not perceived that the consequences, if considered, can be injurious. As to sales where the time for redemption has already expired, it is not easy to see that the debtor or his judgment creditors would be entitled to complain. As to sales where the time has not expired, redemption by payment of the money and ten per cent. may still be had, but the recipient would have no just ground to demur, unless in some special instance, at the loss of a good bargain, which is hardly a tenable objection to a correct decision.

Respectfully submitted,

MELVILLE W. FULLER,
For Appellant.

United States Supreme Court.

OCTOBER TERM, 1877.

IN EQUITY.

IDA WINTER BRINE, by GEORGE J. BRINE, her guardian *ad litem*, *Appellant*,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, *Appellee*.

BRIEF FOR APPELLEE.

GEORGE L. PADDOCK.

CHICAGO:
BULLETIN PRINTING COMPANY, 112 MONROE STREET.
1878.

United States Supreme Court.

OCTOBER TERM, 1877.

IN EQUITY.

IDA WINTER BRINE, by GEORGE J. BRINE, her guardian *ad litem*,
Appellant,
v.
THE HARTFORD FIRE INSURANCE COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE.

May it please the Court:

By its bill filed in the Circuit court, the appellee prayed a decree of foreclosure-sale to satisfy the debt of Bartalott & Barbier under the deed of trust of the land in question. There was nothing unusual in the case presented, and the general scope and object of the bill are stated in appellant's brief.

Besides the immediate parties to the deed of trust, there were four defendants brought into court as having or claiming

some subsequently acquired interest in the land. These were George J. Brine, Ida Winter Brine, Samuel J. Walker and J. Irving Pearce, all of whom were personally served with process (except Pearce, who appeared and answered by his solicitor), and all of whom were parties to the decree of sale. Only one of the defendants before the court below, viz., Ida Winter Brine, took an appeal from that decree. No reason is shown for the non-joinder of the others. None of them is before this court.

With reference to a preliminary inquiry into the jurisdiction of this court under this state of facts, we desire to call the attention of the court to the nature of the interests of these absent defendants.

First, as to George J. Brine. He is in occupancy of the land in question (p. 23 printed record). He says that "We," meaning himself and wife, "moved in within a week or two" after making the contract with Walker (Exhibit D, p. 41 print). That contract runs as follows:

CHICAGO, Nov. 22d, 1870.

I have this day sold Ida R. Brine, wife of George J. Brine, the south house of the block on the east side of Ashland avenue * * being number 84, for the sum of eighteen thousand dollars, five thousand dollars of which sum he has this day paid to me; the balance except an incumbrance of some seven or eight thousand dollars, which he is to assume and deduct, to be paid within twelve months, with eight per cent. interest until paid. Title to be perfect.

(Signed) SAMUEL J. WALKER.

Mr. Brine states that his wife died in October, 1873, and that appellant, their child and her heir, was born in September of that year. He also states (p. 27) that the partial pay-

ment of $5,000 was his own money. This fact is indicated by the receipt in the agreement itself, and it is also apparent from the same document that he was to pay the remainder of the purchase money, including appellant's "incumbrance." Mrs. Brine was not present at this contract. Mr. Brine was in solvent circumstances at the time, and purchased the property for a homestead (p. 27). No deed has ever been made under the contract of Walker, nor has Brine paid the remainder of the purchase money. The facts show, as we submit, either that George J. Brine is solely interested in the land purchased, or that he is united in interest with the appellant, ~~who was~~ husband of the vendee, and was and is the occupant of the homestead purchased with his own money. If George J. Brine by his contract with Walker vested in his wife an equitable title to the fee, subject to the incumbrance, which we understand is the position taken by appellant, he by the same act acquired an interest in the premises by entering upon them as the homestead of his family. And we suggest also that if Walker be legally accountable for the money paid, it is George J. Brine only who can call him to account. Tenancy by the courtesy not having been abolished in Illinois until 1874, it is also a question whether Mr. Brine, at least after his wife's decease, had not a freehold interest in the land. Viewing the transaction as a gift or intended gift by him to his wife, he may be said to have acquired such an interest or to have bargained for it. Giving full effect to the investment of the husband's own funds unmixed with those of the wife, there would have been a resulting trust in favor of the husband even had Walker conveyed to Mrs. Brine. This was, it

seems, the real transaction unless there was a gift; of which there appears to us no sufficient evidence. But, in any aspect of the case, we insist that George J. Brine has a material and necessary interest in the subject matter of appellant's appeal.

Both Walker and Pearce are united in interest with appellant. Pearce is an incumbrancer holding a deed absolute on its face, but designed as a security for a loan of money to Walker. He claims the surplus of the balance of the Brine purchase money after payment of appellee's mortgage.

On payment of the full amount due from Brine, Mr. Pearce would become a trustee for appellant, or George J. Brine, of the mere legal title, and as such bound to convey. Meantime, he holds the legal title subject to the incumbrance of appellee and the rights of the vendee, of which he always had full notice. Having had such notice he stands as to Brine simply as vendor in place of Walker. Should Walker pay his debt to Pearce before the Brine purchase money is paid, Pearce would be obliged to release to Walker the legal title conveyed to him by Walker. In that event, Walker would again assume as to the land, the usual trust of a vendor, and on payment of the price, could be forced to execute such trust by a conveyance. These interests of Walker, Pearce, and George J. Brine, in the equity of redemption in which appellant claims an interest, as heir of Mrs. Brine, are so obvious that it is scarcely necessary to point them out.

The non-joinder of George J. Brine, Walker and

Pearce in this appeal, no cause being shown therefor, is a fatal objection to the jurisdiction of this court.

Owings v. Kincannon, 7 Pet. 399.
Wilson's Heirs v. Ins. Co., 12 Pet. 140.
Forgay v. Conrad, 6 How. 201.
Williams v. Bank, 11 Wheat. 414.
Masterson v. Herndon, 10 Wall. 416.
Simpson v. Greeley, 20 Wall. 152.

In 12 Peters, 140, the court refer to the fact that the motions in 7 Peters, 399, and another case were not made until the cases had been pending in this court two years, and say that where there is a substantial defect in the appeal or writ of error, "the objection may be taken at any time before judgment, on the ground that the case is not legally before us, and that we have not jurisdiction to try it."

The result of the authorities cited is that the objection, although sometimes taken by motion before the cause is reached for argument, is not in the nature of a dilatory application and may be taken at any time before judgment.

We submit that the test to be applied is that a defendant whose interest makes him a necessary party to the decree below cutting off his right, is a necessary party to an appeal from the decree. If the bill had been filed against appellant alone, the court would not, as we assume, if aware of the facts, have made a decree in the absence of the other parties interested with appellant in the equity of redemption. Under the present appeal the same difficulty exists, owing to the absence of the terre-tenant, the holder of the legal title, and a

junior incumbrancer. We therefore ask the court to dismiss the appeal.

The Merits of the Appeal.

Upon the merits of the appeal the appellant has assigned three errors. They are in substance:

1. That the decree of sale omits to provide for a redemption from the sale "in pursuance of the statutes of the State of Illinois relating to redemptions in such cases in force at the time the trust deed was made."

2. That the court denied leave to file the cross-bill of appellant against appellee, Walker and Pearce.

3. That the court confirmed the master's report, and included in the decree the item of $34.82 interest on the interest note [after maturity] the same not being charged on the land by the trust-deed; and $45 and $30 for premiums paid by appellee for insurance "when there was no evidence "to show that the grantors in the trust-deed had failed to "insure, or that appellee was entitled to recover such "premiums."

Holding the opinion that there is no error in the decree, we purpose to consider and hope to answer all these objections of appellant, and in doing so will follow the order in which the matters arose in the court below.

I.

The Cross-Bill.

By the practice of the Circuit court, which on this point, as

we understand it, is based on that of the English court of Chancery, the filing of a cross-bill is not matter of mere right. Application must be made to the court, and that implies that sufficient cause must be shown.

Bronson v. R. R., 2 Wall. 303.

We believe that the English practice requires not only a certificate of counsel but affidavit of the facts. It is, we submit, a sufficient justification of the order complained of, that no cause was shown. The record shows that on the 5th of March, 1875 (p. 12) appellant moved for leave to file the cross-bill; that the original bill and the offered cross-bill were referred to a special master to examine the same and report to the court with his findings thereon; and that the master's report was adverse. Appellant proceeded upon the idea that the cross-bill itself, unsworn, was a sufficient showing of cause. But had there been affidavits we submit that the court correctly denied the application.

A cross-bill is a defense to the original suit, and where the defendant does not show himself entitled to relief as against the original complainant, and in a matter which does not affect complainant's rights, a cross-bill against that complainant is not only unnecessary, but vexatious, as putting him to costs in a matter to which he is a stranger. It was wholly matter of contingency whether or not the sale of the mortgaged premises would realize a surplus over appellee's mortgage. In *Maunders v. Maunders*, 4 Irish Equity Reports, 434, the court dismissed a cross-bill on the point that the equity related merely to a contingent surplus after the satisfaction of complainant's mortgage. As appellant's interests are expressly

subject to appellee's mortgage lien, and as the Circuit court took the same view as that expressed by Baron Lefroy concerning the uselessness of a premature inquiry about surplus, we quote from one of the opinions in the case cited:

"LEFROY, B. In this case I quite concur in the grounds which my Lord Chief Baron has taken, not only for dismissing the cross-bill but also for refusing the inquiry. In truth, to the question I put during the argument I have heard no answer; that is, on what principle can a cross-bill of this nature be sustained—which has no object—prays no relief—with respect to the claim made by the original bill? That bill was filed to have the benefit of a mortgage. It is no defense to the demand made by that bill to say that the settlement was voluntary, for the cross-bill does not impeach the mortgage. But it is said that as the plaintiff prayed that the surplus might be invested upon the trusts of the settlement, that gave the assignee a right to file the cross-bill. But *non constat* there ever would be a surplus, and if there were, he who claimed it was before the court, and it would have been time enough for him to have filed his bill to establish his right to the surplus when the existence of that surplus was ascertained. Until then it was a purely speculative bill, putting the wife and children to support a settlement when *non constat* they would ever derive any benefit from it, upon that ground as well as from the failure of the defendant to impeach the settlement, I am clearly of the opinion that the cross-bill ought to be dismissed with costs."

No relief was prayed by appellant in the cross-bill as against appellee, save that she might be permitted to redeem from the deed of trust. This she had a right to do at any moment, without a cross-bill, and the pretense in the cross-bill that she "could not safely redeem said premises from the lien of said deed of trust, until after settling the question of her right to compel Pearce to convey to her on payment of the balance of the purchase money over and above appellee's mortgage will not bear consideration. There is no question in that question, as Pearce took with full notice. As nobody claims the mortgage money

but appellee, the court was justified in refusing to allow the appellee to be put to costs to answer a cross-bill which, like that above referred to, was purely speculative. The matter of dispute between appellant and Pearce was not dismissed, however, but reserved for the further order of the court on the coming in of the report of sale, with liberty to either of the defendants to apply to the court (p. 45 print). We are at a loss to see how this course injured appellant.

II.

As to the disputed items of account, amounting in all to $109.82, *we submit that they were properly allowed by the master, and that whether they were or not, the decree was not for too large an amount; and, moreover, that whether or not the decree is too large in amount by reason of including the* $109.82, *the appellant is neither a party to the account nor at all interested in the exclusion of the items in question.*

The decree was for $8,170.24, with interest at 6 per cent. from May 23, 1875, which was the date of the master's report; the date of the decree was June 26, 1875. Appellant insists that the court erred in allowing the item of $34.82 as interest after maturity on the interest note. The answer to this objection seems quite simple. The deed of trust and the notes were executed at the same time, as one transaction. The interest note is referred to in the deed of trust with the others, and when produced is shown to bear interest *after maturity*, at the rate and to the amount allowed by the master. We therefore suggest that the deed of trust includes the item.

As to the premiums, it is claimed by appellant that

"there is no proof that the grantors had failed to insure." We point to the report of the master as being under the circumstances, sufficient proof even as against an infant defendant. If this court is to go behind the action of the court below and the report of the master, we suggest that the testimony of Mr. Peabody (p. 23 print) makes out a sufficient *prima facie* case of neglect on the part of the grantors. Although he uses the word "presume," it is fairly evident that he is testifying from his recollection of the course of business in his office. He says, speaking of policies taken out by Bartalott and Barbier: "I do not know if there was any not in force, *but have no doubt they had expired;*" and he refers to the custom of his office to require policies to be taken for the term of the loan, and adds, "as this loan was made "under date of March, 1869, I presume that any policy "taken out at that time as collateral upon the loan, would have "expired before the policy now shown to me was issued." The loan was for five years; it expired in March, 1874; Bartalott and Barbier had before that time parted with their interest. Now there being evidence before the master on the point of the failure of the grantors to keep the property insured, the course to be taken by appellant with regard to the report, was it would seem, matter of mere practice, in the conduct of the cause. In such matters even a minor defendant is bound by the act of its guardian and counsel. Slight proof of a matter negative, and in the knowledge of the other side, is always held sufficient in law. The counsel saw fit to except to other matters, but took no exception either in the master's office or in court to the finding as to the insurance

items. Under such circumstances the report itself may be regarded as sufficient proof to cover $75.00 worth of insurance, and even a minor should be estopped by the acts of counsel as to such a point.

Besides, DE MINIMIS NON CURAT LEX. The money will not pay expenses of printing a brief to demonstrate the mistake, if any there be.

When the arithmetic of the decree is examined with that nicety of computation which appellant seems to demand, it will appear that if an error has intervened by including the premiums, which we do not concede, a considerable amount of interest has been omitted from the decree, viz., from the date of the testimony of Mr. Rieke, April 23d, 1875, to the date of the master's report, May 23, 1875—a full month. Excluding the premiums and bringing down the interest to the date of the report, we would have $8,101.44—within $68.80 of the amount actually decreed. Also, the court allowed only six per cent. from the date of the report, when it would have been equitable to have carried the account down to June 26, 1875, the date of the decree, at nine per cent. on the principal, and at ten per cent. on the interest note. These compensatory errors in favor of appellant, amount to about $20.00 of the above $68.80, and thus reduce it to less than $49.00.

But the matter of this alleged overcharge is wholly immaterial to appellant.

A little reflection should have convinced the appellant that the exclusion of these items was an affair in which she had no interest. Conceding that she is not bound by the

decree, her vendor Walker and his assigns were bound, and still are bound. So are the mortgagors and appellee, between whom the account was stated. No personal decree was made or asked as against appellant. When appellant pays the amount decreed to be due on the appellee's mortgage (including this item of $109.82, which she says was included), the amount to be paid to her vendor under the contract of purchase, viz., 18,000.00 is cut down to the full extent of the disputed items. In other words, she is to pay only the $18,000.00, and it is immaterial whether she pays this item to appellee by decree binding on her vendor, or whether she pays it to her vendor by decree binding on appellee. In either case the breadth equals the length.

III.

The State statute invoked by appellant is a statute regulating the process of the State courts in mortgage foreclosure cases in equity. Having been passed in 1841, *it was not in force in Illinois at the date of the act of Congress of* 1828, *and therefore was not by Congress in that act adopted as a rule for the courts of the Union. There being nothing in this record to show that it was ever adopted by this court or by the Circuit court where the decree was rendered, the State act has no application to the present suit. It was not an error in the Circuit court to disregard it, as was done.*

Constitution of the U. S., Art. 3, §§ 1 and 2.
Act of Sept. 24, 1789 (Temporary Process Act).
Act of Sept. 24, 1789 (Judiciary Act), §§ 2, 3 and 4.
Act of May 8, 1792 (Process Act), § 2.

Act of May 19, 1828 (Process), §§ 1 and 3, 4 Stat. 278.

Act of Aug. 23, 1842, 5 Stat. 516.

Act of June 1, 1872, §§ 5 and 6, 17 Stat. 197.

U. S. Rev. Stat. 1874, §§ 913 to 916 inclusive.

Equity Rules Supreme Court, Nos. 89 and 90.

Sturges v. Crowninshield, 4 Wheat. 123.

Wayman v. Southard, 10 Wheaton 1.

Bank v. Halstead, 10 Wheaton 51.

Boyle v. Zacharie, 6 Peters 648.

Ross v. Duval, 13 Peters 45.

Williams v. Waldo, 3 Scam. 264.

McCracken v. Hayward, 2 How. 608.

Smoot v. Lafferty, 2 Gil. 383.

Thompson v. Philips, Bald. 274.

Am. Law Review, vol. 1, p. 23.

We have cited above the Illinois cases in 3 Scammon and 2 Gilman, not because they can have any bearing on the main question now before the court, but because they arose under the State acts of 1841, and because they exhibit the course of decision in the State as to the impairment of the remedy by redemption or valuation laws passed subsequent to the contract. These cases show that the Supreme court of Illinois, after announcing a different view, finally conformed its action to the decisions of *Bronson v. Kinzie* and *McCracken v. Hayward* upon the constitutional question involved.

These Illinois cases are additionally useful in showing in the clearest possible way that prior to the laws of 1841, in question, the practice of the equity courts of the State was to

sell the mortgaged premises WITHOUT REDEMPTION, as was the English practice, where a sale was ordered at all.

In the mind of appellant's counsel the State law of 1841 "creates a new estate in the mortgaged property in favor of the mortgagor or his grantee to continue 15 months after the foreclosure sale, which no decree of court can take away." This law of Illinois in question, it is elsewhere said by appellant, is "a rule of property binding on all who contract with reference to the same," and to be administered by the Federal courts as well as the State courts when not in conflict with the constitution or treaties of the United States or laws of Congress. Thus counsel fully commit themselves to the formula that the remedy is a part of the contract, and apply the doctrine to the matter of the sale under this decree. If that matter appears to be a matter of final process for the carrying into effect of the judgment of the court, then we submit that by the early, deliberate and authoritative decisions of this court, acquiesced in by the profession and acted upon by the Federal courts for more than half a century, the question is no longer open to discussion. Under the influence of these decisions was passed by Congress the act of 1828, and under that act the Circuit court of Illinois was empowered by Congress to enforce its decrees by process of sale without redemption. In the case of *Branson v. Kinzie*, on which such stress is laid by appellant, the decision of the court turned upon the fact that the mortgage was made before the act of 1841, and that statute was held inoperative because of its tendency to impair the obligation of the mortgage contract. While the correctness of this decision has never, so far as we know, been questioned, either from the bench or at

the bar, we believe the reasoning of the opinion, or so much of it as intimates that the State act of 1841 would apply in the Federal courts to a case of contract subsequent to that act, has never been accepted by either the courts of the Union or the profession. Certain it is that that question was not before the court in the Bronson case; that for nearly thirty-five years the case has been familiar as household words; that it failed to change the mode of executing final process of the circuit in which it arose; that vast amounts of property have been subjected to sale by that court on final equity process from year to year to the present time, under the process act of 1828, without question or cavil.

The case of *Clark v. Reyburn*, 8 Wall. 318, also cited against appellee, seems to us to have no bearing in favor of appellant, as it merely decides that the decree for strict foreclosure in the Circuit court for the District of Kansas was erroneous for lack of conformity with the 90th rule of equity practice of this court, as it did not find the amount due, nor give a day for its payment before barring the equity. So far as the case has bearing, it is in favor of the position of appellee, viz: that in executing the judgment by the sale or appropriation of the subject matter, the court is governed by Federal statute or rules of court made thereunder.

The decree appealed from in the present case was an equity decree *in rem*. More specifically it was a decree upon a bill for mortgage foreclosure-sale. Like all such decrees, it contains the judgment of the court as to the rights of the parties under the contract, and also directs the master to take measures to subject the land to satisfy the amount found due.

It is easy to perceive that the part which finds that the mortgage was made, and by whom it was made, ascertains the subject matter and adjudges payment of the amount due, is to be distinguished from the part which directs the subsequent proceedings of the master to make the money. The latter part is as much final process as if it were a separate writ issued by a clerk, or a *fieri facias* upon a judgment at law.

The difference in mode followed in courts of equity, is one of form and convenience merely. So far as substance is concerned, it would be competent to omit all express and detailed reference in the decree to the proceedings of the master subsequent to the decree, if there were some Federal statute or rule of court of a general nature, providing a form of execution to be issued by the clerk to the master, or other ministerial officer. In a judgment for plaintiff in assumpsit, the entry finds the damages and costs, and directs "that the plaintiff have execution therefor." What the form of the writ shall be, and what the officer shall do under it, are not stated, but are implied, and can only be ascertained by reference to the statute, or to common law usage. This analysis will show the fallacy of the argument, that the acts of the master under the decree, or the right of the court to direct and control those acts for the carrying into effect of its own judgments, stands on any different footing from the right of the Circuit courts as courts of law, to regulate their final process solely by the Federal law—a right which was so elaborately discussed and conclusively affirmed by this court in the cases cited. Says Chief Justice Marshall in one of those cases, *Wayman v. Southard*.

"The value of the process of execution depends upon the time

"when it may be had, and the manner in which it may be executed, and "the subject upon which it may be levied.

"If it should be asked whether a state may not withdraw certain "kinds of property from execution, the answer would be, that this was "not the question here, and it was not necessary to go out of the case.

"If the power to establish a judiciary necessarily include the power "to confer upon it the authority to use the needful remedies, it must cer- "tainly be allowed that the states cannot hinder and destroy the process "of execution. Such a right is wholly incompatible with the power of "the Union in Congress assembled. If it may withhold one process it "may withhold all. If it can modify, i.e., impair, or weaken, the effi- "cacy of the process, the consequence is the same. The courts would "be then left with the power to adjudicate, but without the power to "enforce their decisions. But here the property sought to be reached is "subject to execution by the laws of the state; and where the end is per- "mitted, the means of attaining it must be left free."

Speaking of the law of the state as a rule of decision, the Chief Justice adds:

"As construed by the court, this section" [§ 34 Judiciary Act] "is "the recognition of universal law; the principle that, in every forum, a "contract is governed by the law with a view to which it was made.

"But the question respecting the right of the courts to alter the "modes of proceeding in suits at common law, established in the Process "Act, does not arise in this case. That is not the point on which the "judges at the circuit were divided, and which they have adjourned to "this court. The question really adjourned is, whether the laws of "Kentucky respecting executions, passed subsequent to the Process Act, "are applicable to executions which issue on judgments rendered by the "Federal courts?

"If they be, their applicability must be maintained, either in virtue "of the 34th section of the Judiciary Act, or in virtue of an original "inherent power in the state legislatures, independent of any act of "congress, to control the modes of proceeding in suits depending in the "courts of the United States, and to regulate the conduct of their "officers in the service of executions issuing out of those courts.

"That the power claimed for the state is not given by the 34th sec "tion of the Judiciary Act, has been fully stated in the preceding part "of this opinion. That it has not an independent existence in the state "legislature, is, we think, one of those political axioms, an attempt to "demonstrate which, would be a waste of argument not to be excused. "The proposition has not been advanced by counsel in this case, and "will probably never be advanced. Its utter inadmissibility will at "once present itself to the mind, if we imagine an act of a state legisla- "ture for the direct and sole purpose of regulating proceedings in the "courts of the Union, or of their officers in executing their judgments. "No gentleman, we believe, will be so extravagant as to maintain the "efficacy of such an act. It seems not much less extravagant, to main- "tain that the practice of the Federal courts, and the conduct of their "officers, can be indirectly regulated by the state legislatures, by an act "professing to regulate the proceedings of the state courts, and the con- "duct of the officers who execute the process of those courts. It is a "general rule, that what cannot be done directly from defect of power, "cannot be done indirectly.

"The right of congress to delegate to the courts the power of altering "the modes (established by the Process Act) of proceedings in suits, has "been already stated; but, were it otherwise, we are well satisfied that "the state legislatures do not possess that power.

"This opinion renders it unnecessary to consider the other ques- "tions adjourned in this case. If the laws do not apply to the Federal "courts, no question concerning their unconstitutionality can arise in "those courts."

It is evident from the above language of Chief Justice Marshal, that he had clearly in view the distinctions between the judicial power to make, and the ministerial power to enforce, the decision of the court. While the State law may furnish the rule of decision, it cannot furnish nor control the mode of process to enforce the decision. On the maintenance of this distinction rests the efficacy, if not the existence, of the Federal judicial system.

In *U. S. Bank v. Halstead*, 10 Wheat. 53, which was a suit at law, the writ of *venditioni exponas* of the Circuit court for the district of Kentucky, commanded the marshal to expose for sale the land of Venable, one of the defendants. The marshal returned that he had not sold the property, no indorsement having been made on the writ that Kentucky bank notes would be received in payment of the judgment, and he not having been offered three-fourths of the appraised value as arrived at according to the law of Kentucky of Dec 21, 1821. The Circuit court were divided in opinion upon the motion to quash the marshal's return, and they certified to this court the questions:

1. Whether the Kentucky statute when applied to the case was, or was not, repugnant to the Constitution of the United States.

2. Whether, if not repugnant to the Constitution, it would operate upon the mode in which the *venditioni exponas* should be enforced by the marshal, and forbid a sale of the land levied upon unless it commanded three-fourths of its value when estimated according to the provisions of the said act.

It appears from this case, that at the time of the passage of the Process act, 1792, land in Kentucky was not subject to sale on execution, though a State law subjecting it to such sale, was passed shortly after in the same year.

Subsequent to passage of the State law, the Federal Circuit court had altered its mode of proceeding so as to cause its executions to be levied upon lands.

"When therefore," says Thompson, J. "the law of Kentucky made "lands subject to executions, it was carrying into effect the spirit and "object of the act of congress, for the Circuit court so to alter and add "to the form of its execution, as to *authorize the taking and selling the* "*debtor's land*.

"It is said, however, that this is the exercise of legislative power, "which could not be delegated by congress to the courts of justice. But "this objection cannot be sustained. There is no doubt that congress "might have legislated more specifically on the subject, and declared "what property should be subject to executions from the courts of the "United States. But it does not follow, that because congress might "have done this, they necessarily must do it, and cannot commit the "power to the courts of justice. Congress *might regulate the whole* "*practice of the courts*, if it was deemed expedient so to do; but this "power is vested in the courts; and it never has occurred to any one "that it was a delegation of legislative power."

Again he says (10 Wheat. p. 53):

"It cannot certainly be contended with the least color of plausi- "bility, that congress does not possess the uncontrolled power to legis- "late with respect both to the form and the *effect* of executions issued "upon judgments recovered in the courts of the United States."

And it is to be remembered that neither in the opinions in the cases in 10 Wheaton, nor in that of *McCracken v. Hayward* is the doctrine of non-applicability of State law put upon the ground of the relative dates of the statute and contract. It was clearly perceived by the learned judges that if the state laws had no reference, nor applicability to the subject of final process in the Federal courts, it was unimportant to inquire whether they were passed before or after the date of the contract. In the State court the question of date is, or may be, of vital importance in determining the other question of impairment of obligation. If a State process statute impairs the

obligation of the contract entered into previous to its date it is void in either forum—State or Federal. If it is a final process act for the State courts passed prior to the contract, it is not void as impairing the contract, but is simply inoperative outside of the courts to which it expressly applies. There is in the State legislature a mere and total lack of power over the process of the Federal courts, whether by prospective or by retrospective statute.

In *Boyle v. Zacharie* (6 Peters) Mr. Justice Story uses the following language with reference to the subject now under disussion:

"The chancery jurisdiction given by the Constitution and laws of "the United States is the same in all the States of the Union, and the "rule of decision is the same in all. In the exercise of that jurisdic- "tion, the courts of the United States are not governed by the State prac- "tice; but the act of Congress of 1792, c. 36, has provided that the modes "of proceeding in equity suits shall be according to the principles, "rules and usages which belong to courts of equity as contradistin- "guished from courts of law. And the settled doctrine of this court is "that the remedies in equity are to be administered, not according to the "State practice, *but according to the practice of courts of equity in the parent* "*country* as contra-distinguished from that of courts of law; subject, "of course to the provisions of the acts of Congress, and to such altera- "tions and rules as in the exercise of the powers delegated by those "acts the courts of the United States may from time to time prescribe. "*Robinson v. Campbell*, 3 Wheat. 212; *United States v. Howland*, 4 "Wheat. 108." * * "In respect to suits at common law, it is true "that the laws of the United States have adopted the forms of writs, "executions and other process, and the modes of proceeding authorized "and used under the State laws, subject, however, to such alterations "and additions as may from time to time be made by the courts of the "United States. But writs and executions issuing from the courts of "the United States in virtue of these provisions are not controlled or

"controllable in their general operation and effect by any collateral "regulations and restrictions which the State laws have imposed upon "the State courts to govern them in the actual use, suspension or super- "seding of them. Such regulations and restrictions are exclusively "addressed to the State tribunals, and have no efficacy in the courts of "the United States unless adopted by them. The case of *Palmer v.* "*Allen*, 7 Cranch 550-564, furnishes a commentary on this point, and it "is freely expounded and illustrated in the subsequent cases of *Way-* "*man v. Southard*, 10 Wheat. 1, and *United States Bank v. Halstead*, 10 "Wheat. 51. No rule of the Circuit court of Maryland has been pro- "duced which adopts these State regulations, and the existence of one "is not to be assumed."

THE FEDERAL PROCESS ACT OF 1828.

It is said by Justice McLean in *Ross v. Duval*, 13 Peters 45, that the act of 1828 was passed shortly after the decision of the cases in 10 Wheaton, and was intended as a legislative sanction to the opinions of the court in those cases. "The act of 1828 provided that the forms and modes of pro- ceedings in equity in the courts of the United States held in those States admitted to the Union since Sept. 29, 1789 [this includes Illinois] should be, according to the principles, rules and usages which belong to courts of equity * * as con- tradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of Congress, subject, however, to such alterations and additions as the said courts of the United States respectively shall in their discre- tion deem expedient, or to such regulations as the Supreme court of the United States shall think proper by rules to prescribe to any Circuit or District court concerning the same."

In section 3 of the same act it was provided that—

"Final process on judgments and *decrees* rendered in any of the

"courts of the United States, and the proceedings thereupon, shall be "the same, except their style, in each state, as are now used in the courts "of such state, saving to the courts of the United States, in those states "in which there are not courts of equity with the ordinary equity juris- "diction the power of prescribing the mode of executing their decrees "in equity by rules of court: *Provided, however*, that it shall be in the "power of the courts, if they see fit in their discretion, by rules of "court, so far to alter final process in said courts as to conform the "same to any change which may be adopted by the legislatures of the "respective states for the state courts."

At the time of the passage of the act of 1828, there existed in Illinois courts of equity, with the ordinary equity jurisdiction; and final process on foreclosure-sale, decrees in those courts was by means of a sale without redemption. It follows that the law of 1828 adopted that mode of final process, and it is incumbent on appellant to show that in some way the mode has been subsequently changed so as to require a sale with redemption.

Appellant has shown that final process in the State courts has been changed by the law of 1841, but has failed to show, and does not claim that such change has ever been adopted by the Federal Circuit court. If no such adoption has taken place, the mode of final process must necessarily be unaffected by the statute on which she relies.

It is not assigned for error that the decree is not in conformity with every rule applicable to final process other than the supposed rule afforded by the State statute of 1841. The 89th equity rule gives to the Circuit court a wide discretion in the matter of "practice proceedings and process mesne and final," and, in the absence of any evidence to the con-

trary, it will be assumed in this cause that the process awarded by the decree was regular and proper.

FINAL PROCESS UNDER RECENT FEDERAL STATUTES AND THE EQUITY RULES OF THIS COURT.

It is not necessary but may perhaps be convenient to the court or counsel to give the later acts of congress on the subject. This we do, and add the 89th and 90th rules in equity; not with a view of informing the court as to their nature, but in order that it may appear at a glance that these rules with the statutes referred to in this brief complete the exclusive and adverse occupancy under Federal authority of the entire field of dispute, entrance to which under the statute of Illinois is claimed by counsel for appellant. We regard these positive laws of Federal origin bearing upon final process as ocular demonstration that the courts and court officers of the United States are, and always have been, in the exclusive possession of the powers of sale in controversy.

The act of congress of June 1, 1872 (17 Stat. 197), § 5, provided that "the practice pleadings and forms and modes of "proceeding in *other than equity and admiralty causes* in the "circuit and district courts of the United States, shall con- "form as near as may be to the practice, pleadings, and forms "and modes of proceeding existing at the time in like causes "in the courts of record of the state within which such circuit "or district courts are held, any rule of court to the contrary "notwithstanding, provided, however, that nothing herein "contained shall alter the rules of evidence under the laws "of the United States." * *

Thus it appears that equity proceedings were not affected by the act, but left as before, to be governed by the Process acts and by rules of court. The Revision of 1874 (sec. 914) re-enacts as to suits other than equity and admiralty, the 5th section of the act of June 1, 1872, and as to the excepted suits, provides (sec. 913) that "the forms of mesne "process, and the forms and modes of proceeding in suits of "equity and of admiralty, and maritime jurisdiction in the "circuit and district courts, shall be according to the prin- "ciples, rules, and usages which belong to courts of equity "and of admiralty respectively, except when it is otherwise "provided by statute, or by rules of court made in pursuance "thereof; but the same shall be subject to alteration and "addition by the said courts respectively; and to regulation "by the Supreme court, by rules prescribed from time to "time, to any circuit or district court, not inconsistent with "the laws of the United States." Sec. 916 relates to common law causes, and gives the successful party "similar "remedies by execution or otherwise, to reach the property of "the judgment debtor as are now provided in like causes by "the laws of the state in which such court is held, or by any "such laws hereafter enacted *which may be adopted by general "rules of such circuit or district court; and such courts may "from time to time by general rules, adopt such state laws "as may hereafter be in force in such state in relation to "remedies upon judgments, as aforesaid, by execution or other- "wise.*" Sec. 917 relates to equity and admiralty causes, and in effect vests in this court the power "generally to regu- "late the whole practice to be used, in suits in equity or admir- "alty, by the circuit or district courts."

This recent legislation is not materially different on the point under discussion, from the former system under the act of 1828, and the decisions in 10 Wheaton. It is apparent that the entire series of Federal process acts, treats the State law upon the subject of final process, whether at law or in equity, as inoperative and inapplicable to the subject, until adopted as a Federal regulation.

Equity Rules, 89.

"The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same."

Eq. R. 90.

"In all cases where the rules prescribed by this court, or by the circuit court, do not apply the practice of the circuit court, shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

That the jurisdiction and process of the Federal courts are beyond the purview of State law is also illustrated by the following cases:

Cowles v. Mercer Co., 7 Wall. 118.

Payne v. Hook, Ibid. 425.

Railway v. Whitton, 13 Wall. 286.

Even the extreme case of express contract by non-resident corporation, not to sue in the Federal courts, will not deprive those courts of jurisdiction.

Ins. Co. v. Morse, 20 Wall. 445.

Doyle v. Ins. Co., 94 U. S. 535.

These cases at least indicate that the Federal jurisdiction, and the mode of its exercise, cannot be limited or controlled by State law or by contract.

No reading upon this subject is complete, as it seems to counsel for appellee, which does not include the article by the late Jacob A. Cram, Esq., of the Chicago bar, cited in our brief, and published in 1866 in the American Law Review, Vol. I., p. 23. It is matter of justice to the memory of this gentleman, as well as a pleasure to us, to acknowledge the great assistance derived from his paper. We give some of its concluding portions:

"But why pursue this metaphysical nonentity farther? If weight of "authority be considered, the names of Marshall, Story, Duval, Johnson "and McLean, in opposition to the doctrine that the remedy is a part of "the contract, it is believed, will outweigh the names of the learned "judges who have approved that doctrine. It is to be noticed also, that "Mr. Justice Curtis, in giving the opinion of the court in *Curran v. The "State of Arkansas*, 15 How. 305, while approving the decisions in *Bronson v. Kinzie*, and *McCracken v. Hayward*, carefully steers clear o "the line of argument there pursued. And the decision that the obligation of the contract might be impaired by impairing the remedy was "originally made without reference to this doctrine."—*Sturges v. Crowninshield*, 4 Wheat. 123.

"But grant, for the sake of argument, that the remedy is part of "the contract. Then the remedies administered in the courts of the "United States are as much a part of the contract as those of any other "tribunal. When parties are entitled to sue in the courts of the United

"States, contracts are entered into quite as much with reference to the "remedies there provided as with reference to the remedies of the State "tribunals. In the case before alluded to, Bronson doubtless took the "mortgage entirely with reference to the redress he could obtain "in the courts of the United States, in case of default by his mortgagor. "But what then becomes of the argument against the validity of the "practice of the United States court, based on the theory that the remedy "is a part of the contract? Before it can be determined whether or not "a particular remedy is a part of the contract, it must first be decided "whether or not it is a legal remedy; and to say that a particular rem-"edy is not a part of the contract, therefore it is not a legal remedy, is to "reverse the true order of inquiry, and to assume the very point in dis-"pute. As this argument has been so often and so strongly pressed to "prove the invalidity of the practice of the Federal courts when that prac-"tice is in conflict with State laws, let us restate the doctrine, that the "remedy is a part of the contract, pushed as far as it can possibly be "pushed without flying in the face of jurisprudence itself. Take the "case of a promissory note. First there is the stipulation to pay a cer-"tain sum of money at a certain time. What the thing thus agreed to be "done was, and whether it was a valid and lawful contract or not, "depends on the law of the place where the contract was made.

"That law is the law of the contract, and the contract is the same "in its legal effect in every tribunal before which it can be brought for "adjudication. Then follows a stipulation, that, if the note is sued on "in the courts of the State where it was made, substantially the same "remedy shall be given for the breach of the contract as was provided "for by the laws of the State at the date of the note. And, if the note "is sued on in any other State, its remedies shall be administered in "accordance with the same principle. And, finally, the note concludes "with the empty agreement, or: That, if suit is brought on it in a court of "the United States, or of any foreign nation, the plaintiff shall be "entitled to such redress as that court may see fit to give him. Thus, "in all Illinois mortgages made since the passage of the redemption "law, there is interpolated into the mortgage, first, a stipulation that the "mortgagee, on default may foreclose in the State court, and obtain a "decree for the sale of the mortgaged property, with a right of redemp-

"tion in the mortgagor, according to the State law; and, second, that he "may foreclose in the Federal court, if he can bring himself within its "jurisdiction, and obtain a decree for an absolute sale of the mortgaged "property, according to the practice of that court. If both these "remedies are lawful remedies, both are equally a part of the contract. "But whether they are lawful or not cannot be ascertained by repeating "the shibboleth, that the remedy is a part of the contract. Mr. Chief "Justice Taney, and Mr. Justice Baldwin, in *Bronson v. Kinzie* and "*McCracken v. Hayward*, it must be remembered, were arguing as to the "effect of a State law on a State tribunal; and they held that the State "remedies were a part of the contract, and must be administered by the "State courts as they existed and were contracted for at the time the "contract was entered into. They did not say, for they had no occasion "to say, that, by a further stipulation of the contract, the remedies of "the courts of the United States, and of every other State, were also "made a part of the contract; imported into it on the same grounds on "which the State remedies were made a part of it, to be applied by "each court respectively, in case the contract should be brought before "it for adjudication. From overlooking this fact, has arisen the whole "confusion of ideas under cover of which the argument has been "advanced, that, because the State remedies are part of the contract, "therefore they are the only remedies that are a part of it; and that the "remedies administered by the Federal courts are thereby excluded from "the contract, so far as they attempt to give any other or different relief "than that provided by the laws of the State. Whereas, the argument "that proves that the State remedy is a part of the contract, proves that "the remedy of the Federal court is a part of it also. But what reme-"dies the Federal court can lawfully administer, is left as much at large "as before.

"The original question then recurs, Has a State an inherent power "to prescribe the form, means and effect of final process, issued on "judgments and decrees in the courts of the United States exercising "jurisdiction within its limits? It is to be observed, to avoid any am-"biguity, that in equity practice, the decree is both the judgment of the "court and the final process by which the judgment of the court is to "be executed. At law, the ministerial officer of the court acts under

"the execution issued on the judgment. In equity, he acts directly "under the decree, which is itself final process. But it has never been "doubted that the process acts of the United States prescribe as fully "and explicitly the form and effect of final process in equity as at law.

"Mr. Chief Justice Taney, in his *dictum* giving an affirmative answer "to the question above propounded, cloaks it in a plausible ambiguity. "'Every state,' he says, 'has the power to prescribe the legal and equit- "able obligations of a contract to be made and executed within its jur- "isdiction. * * * It is a case of that description that is now before "us, and we do not think it proper to go beyond it.' Why, if a judge "has determined to give a *dictum* on a point not before the court, he "should feel himself restricted to any particular *dictum* is not obvious. "But, take the *dictum* as it stands, what does it mean?

"It is well settled that a State may prescribe what contract made "and to be executed within its jurisdiction shall be legal, and what "illegal; and a contract, void or illegal in the place where it is made, is "void everywhere. So, also, it is often necessary to look to the laws of "the State and the customs of the place where the contract was made "to ascertain what the thing agreed to be done by the contract really "was; and the courts of the United States recognize these principles as "well as every other court. The thirty-fourth section of the judiciary "act, which provides that the laws of the States shall be regarded as "rules of decision in trials at common law, was declared by the Supreme "court to be merely an affirmation of the general principle of law that in "every forum a contract is governed by the law with a view to which it "was made. But they at the same time declared, that the principle did "not apply to laws regulating final process. To the extent to which "these and similar principles go, a State can prescribe the legal and "equitable obligations of contracts. But what more does that term "imply? What is the obligation of a contract? Chief Justice Mar- "shall said in *Sturges v. Crowninshield*, 4 Wheat. 122: 'A contract is an "agreement in which a party agrees to do or not to do a certain thing; "the law binds him to perform his undertaking, and this is, of course, "the obligation of the contract.' Mr. Sedgwick, in his treatise on "statutory and constitutional law, says that he is unable to distinguish "between the obligation of a contract and the remedy. It is a prac-

"tical answer to this query to say, that whatever a party can be obliged "by law to do or suffer by virtue of his contract, that is its legal obliga- "tion. But what a party can be compelled to do or to suffer, by enforce- "the contract against him in a court of justice, depends on the process "laws governing the tribunal in which the action is brought; or, in "other words, on the remedies administered by that tribunal. If, there- "fore a State can prescribe the legal and equitable obligations of a con- "tract made and to be executed in it, and that obligation is limited by "the remedies given to the injured party on a breach of the contract by "the laws of the State, then these remedies are the limit of the obliga- "tion of the contract in every other and foreign tribunal in which it is "sought to be enforced; and these remedies, and no other, must be "administered by such tribunal. In other words, it is the old proposi- "tion of the inherent power of a State to regulate final process in the "courts of the United States; which, we have the highest authority for "saying, it would be a waste of argument to refute.

"But, it is said, exemption laws, and laws conferring equities of "redemption on mortgagors, are rules of property, and rules of prop- "erty are of universal obligation. This, again, is merely begging the "question. These laws are no more rules of property than any other "law regulating final process, and providing how far, and in what way, "property may be attached on final process. Thus, in *McCracken v.* "*Hayward*, the whole court, including Chief Justice Taney, held that "the appraisment law of Illinois, which provided that property levied "on under execution should be appraised before sale, and should not "be sold unless it should bring two-thirds its appraised value, was not "binding on the federal court unless it had been adopted under the "statute as a rule of that court. But, a law providing that property "can be taken on execution only under certain restrictions, is, in its "nature, as much a rule of property as a law providing that it cannot "be levied on at all.

"Moreover, such a doctrine would strike at the foundation of the "equity jurisdiction of the United States courts. That jurisdiction is "the same in every State, its rules of decision the same, and the means "of carrying its decisions into effect the same, except so far as they are "modified by rules of court, or the act of 1828. But it would surely

" be as outrageous an infringement of a rule of property in a State
" whose courts had no equity jurisdiction, and gave no equitable relief,
" for a Federal court to decree the specific performance of a contract for
" the conveyance of land, thereby divesting one party of his title and
" conferring it on the other, as for that court to levy an execution on
" the same land, which was exempt from such levy by the laws of the
" State. The equitable jurisdiction of the Federal court would thus be
" cut down to the measure of the jurisdiction of the State courts.

" Besides, a State may enact that the executions of some of its tri-
" bunals may, and that the executions of others of its tribunals may not,
" be levied upon real estate; and, if its laws can affect the levies of exe-
" cutions of the Federal court at all, it may place those executions in
" which of these two classes it pleases. Nay, more; if it can exempt,
" by State laws, any property from Federal executions, it can exempt
" all property from those executions; and, if it can give a mortgagor
" fifteen months, or three years redemption from an absolute sale under
" a foreclosure in the Federal courts, it can give a perpetual right of re-
" demption. There is no statute, State or Federal, and no principle of
" the common law, that requires the practice and process of the State
" and Federal courts to be alike; and, if the State can alter the process
" or practice of the Federal courts at all, it can alter them as it pleases.

" But, after all, the whole question is one of fact and not of law, nor
" which admits of logical deduction or proof. No one doubts that the
" constitution and laws of the United States might be so framed as to
" create tribunals entirely independent of State control, having a prac-
" tice and processes peculiar to themselves, and exercising such juris-
" diction over the person, and property of citizens of the States within
" the sphere of their authority as the laws of congress should ordain.
" Whether they have been so framed can only be decided on an exam-
" ination and construction of the constitution and of the laws passed in
" pursuance of it, creating and defining the jurisdiction and powers of
" the Federal courts. That construction was given by the Supreme
" court of the United States, in the luminous opinion of Chief Justice
" Marshall, in *Wayman v. Southard*; and such was declared to be sub-
" stantially the character of the Federal courts. The processes and prac-
" tice of the Federal courts were created and can be changed and con-

"trolled, only by and under the laws of the United States. Every fallacy,
"whether it be that the remedy is a part of the contract and therefore
"that the State remedies are the remedies and the law of the contract; or
"the plausible ambiguity, that every State has the power to prescribe
"the legal and equitable obligation of contracts made and to be per-
"formed within it,—when analyzed and reduced to their true expression
"will be found to be covered by the law of that decision. It settled
"finally, the whole question. The process act of 1828 passed shortly
"after this decision was announced, has been declared by the Supreme
"court to be a legislative endorsement of its soundness and the principles
"then declared have been repeatedly affirmed, but never directly ques
"tioned by any court

"No legal tribunal exacts a literal performance of all contracts
"litigated before it. What redress it shall give, how far the life, liber-
"ty, and property of the defendant can be attacked by its final process,
"depends on the views of policy of the sovereignty creating that tri-
"bunal, having regard as well to the interests and welfare of the com-
"munity as to the rights and obligations created by the contract of the
"parties. The constitution places no restriction on a State in framing
"its policy in this regard. The redress administered by its tribunals
"may be stringent or lax, as its views of public policy may dictate. The
"Constitution only requires, that, when this policy has once been es-
"tablished, its stringency shall not be relaxed as to contracts entered
"into during its continuance. But the remedies to be administered by
"a Federal court sitting as an inter-state tribunal, exercising its jurisdic-
"tion only over parties owing no common state allegiance, and how far
"the life, liberty and property of the defendant can be attacked by its final
"process, depend, not on the policy of the State, but on the policy of
"the Federal government. And no State law establishing or changing
"its own form of final process, or attempting to affect that of a Federal
"court can arrest an officer of that court in execution of its process or
"impeach the validity of its proceedings.

"It follows, therefore, that no State law passed since 1828, can
"in any way affect, *proprio vigore*, the final process of the courts of the
"United States; and that, in States which in 1828 had no courts of
"ordinary equity jurisdiction, the jurisdiction and practice of the

"Federal courts are regulated by the statute of 1792. That law con-
"ferred a general equity jurisdiction on the Federal courts, as known
"and defined by the Chancery court of England. It adopted the forms
"and processes of that court; and no State law passed before or since
"the date of that statute, can divest a Federal court acting under it, of
"any portion of its jurisdiction, nor affect the forms of its decrees, or
"the means by which they are carried into effect."

These words, it is true, are not spoken by judicial authority, but at least we can claim for them that they are uttered in the judicial spirit, and that the article from which they are taken is a thorough discussion of the law of the subject as it stood at that date, and as it yet stands.

If therefore, the act of the State legislature of 1841, does not apply to the conduct of the Circuit court in the execution of its final process of sale under the decree in controversy; and if, as we think has been shown, that entire subject is covered by Federal legislation, and the rules of this court in such a mode as not to include or adopt the State statute as a rule of practice, there has been no error in ignoring it, and in following the act of 1828 governing the subject.

Respectfully submitted,

GEORGE L. PADDOCK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1877.

IDA WINTER BRIŇE, BY GUARDIAN, &c.,

Appellant,

v.

THE HARTFORD FIRE INSURANCE COMPANY,

Appellee.

ARGUMENT OF EDWARD S. ISHAM,

ON BEHALF OF APPELLEE.

ISHAM & LINCOLN, Solicitors, &c.

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ARGUMENT.

We present the considerations advanced in this argument upon only the one general question involved in the first assignment of error: and we do so because the usage in equity, settled for more than fifty years in the circuit court in which this case arose, and under which the titles to an incalculable amount of property have been transferred, is now in a number of pending causes brought for the first time into dispute, and this important question must, first in this cause, come to the attention of the court. It is assigned as error that the *decree* ordering a foreclosure sale *omits to provide for* such redemption from the sale as is allowed by the statute of Illinois, in force when the mortgage was made.

The form in which the question arises may be clearly and concisely shown. The act of congress of September 29, 1789, provided as follows:

"*The forms of writs and executions*, except their style, *and modes of* "*process* in the circuit and district courts, in suits *at common law*, "shall be the same in each State respectively as are now used or al- "lowed in the supreme courts of the same. And the *forms and* "*modes of proceedings* in causes of *equity*, and of admiralty and mari- "time jurisdiction, *shall be according to the course of the civil law.*"

This statute was from time to time continued in force until the act of congress of May 8, 1792, that provided as follows:

"That the forms of writs, executions and other process, except their "style and the forms and modes of proceeding in suits in those of "*common law*, shall be the same as are now used in the said courts re-

"spectively in pursuance of the act, entitled, 'An Act to regulate "'processes in the Courts of the United States,' *in those of equity* "and in those of admiralty and maritime jurisdiction, *according to* "*the principles, rules and usages which belong to courts of equity* and to "courts of admiralty respectively, *as contradistinguished from courts* "*of common law*; except so far as may have been provided for by the "act to establish the judicial courts of the United States, subject "however to such alterations and additions as the said courts respect- "ively shall in their discretion deem expedient, or to such regula- "tions as the supreme court of the United States shall think proper, "from time to time by rule to prescribe to any circuit or district "court concerning the same."

The equity procedure of the Federal circuit courts therefore rested upon the provisions of the constitution, and upon those acts of congress until May 19th, 1828. By the act of congress of that date, it was provided as follows:

"That the forms of mesne process, except the style, and the *forms* "*and modes of proceeding* in suits in the courts of the United States, "held in those States admitted into the Union since the 29th day of "September, in the year seventeen hundred and eighty-nine, in those "of *common law*, shall be the same in each of the said States, respect- "ively, as are now used in the highest court of original and general "jurisdiction of the same, *in proceedings in equity, according to the* "*principles, rules and usages which belong to courts of equity*, and in "those of admiralty and maritime jurisdiction, according to the prin- "ciples, rules and usages which belong to courts of admiralty, *as con-* "*tradistinguished from courts of common law*, except so far as may "have been otherwise provided for by acts of congress; subject, "however, to such alterations and additions as the said courts of the "United States, respectively, shall, in their discretion, deem expedi- "ent, or to such regulations as the supreme court of the United "States shall think proper, from time to time, by rules, to prescribe to "any circuit or district court concerning the same."

"That writs of execution and *other final process* issued on judgments "and decrees rendered in any of the courts of the United States, and "the proceedings thereupon shall be the same, except their style, in "each State, respectively, as are now used in the courts of such State, "saving to the courts of the United States, in those States in which "there are not *courts of equity, with the ordinary equity jurisdiction*, "the power of prescribing the mode of executing their decrees in

"equity by rules of court: *Provided, however*, That it shall be *in the* "*power* of the courts, if they see fit *in their discretion, by rules of* "*court*, so far to alter final process in said courts as to conform the "the same to any change which may be adopted by the legislatures of "the respective States for the State courts."

Throughout these enactments the intention is conspicuous to distinguish between remedies and procedure at common law and in equity, in reference to this matter of conformity to the regulations of the respective States. While the proceedings and process at common law are conformed to those of the States, the modes of proceeding in equity causes are required to conform to the principles and usage of the equity tribunals of the parent country, from which we derive the principles and methods of our equity jurisprudence and judicature. Accordingly, the law of 1789 enacts that the forms and modes of proceedings in causes of equity "shall be according to the course of the civil law": the law of 1792, that they shall be, except as otherwise provided by congress, or by the courts by authority of congress, "according to the principles, rules and usages which belong to "courts of equity, as contradistinguished from courts of common "law"; and the law of 1828 re-enacted the same requirement as to mesne process and forms and modes of proceeding. It provided that *final* process issued on judgments and decrees should be the same as was THEN, in 1828, used in each State respectively; but in those States in which there were *not* courts of equity with the *ordinary* jurisdiction, it saved to the courts of the United States the power of prescribing by rules the *mode of executing their decrees* in equity. Then in a *proviso*, this act of 1828 gave *power* to the courts by rule, *if they see fit*, to alter their final process so as to conform it to legislative changes in the respective States. There appears, therefore, to be a settled policy that the whole administration of remedies in equity, and the modes of executing decrees, should stand peculiarly apart from the varying modes in operation in the respective States, and should everywhere conform to the principles and practice of the English courts of equity, except as altered by acts of congress or the rules of the courts made in the exercise of powers delegated by those acts.

Accordingly in *Robinson* v. *Campbell*, [1] the court said:

"The court, therefore, think that to effectuate the purposes of the "legislature, the remedies in the courts of the United States are to be, "at common law or in equity, not according to the practice of State "courts, but according to the principles of common law and equity, "as distinguished and defined in that country from which we derive "our knowledge of those principles."

And in *Boyle* v. *Zacharie*, [2] in 1832, the court said:

"The chancery jurisdiction given by the constitution and laws of "the United States, is the same in all the States of the Union, and the "rule of decision is the same in all. In the exercise of that jurisdic- "tion, the courts of the United States are not governed by the State "practice; but the act of congress of 1792, c. 36, has provided that "the modes of proceeding in equity suits shall be according to the "principles, rules and usages which belong to courts of equity, as "contradistinguished from courts of law. And the *settled doctrine of "this court is* that the remedies in equity are to be administered, not "according to the State practice, but according to the practice of "courts of equity in the parent country, as contradistinguished from that "of courts of law; subject of course to the provisions of the acts of "congress, and to such alterations and rules as, in the exercise of the "powers delegated by those acts, the courts of the United States may "from time to time prescribe."

In *Payne* v. *Hook*, [3] the court said:

"If *legal remedies* are sometimes modified to suit the changes in the "laws of the States, and the practice of their courts, *it is not so with "equitable*. The equity jurisdiction conferred on the Federal courts, "is the same that the High Court of Chancery in England possesses; "is subject to neither limitation nor restraint by State legislation, and "is uniform throughout the different States of the Union."

Now, in the year 1828, the State of Illinois had courts of equity having "ordinary equity jurisdiction"; and it was the practice of those courts in decrees of foreclosure, to give certain time for the payment of the debt, and to order sale of the premises mortgaged, if the debt was not paid within the time allowed. This

1 3 Wheat., [illegible] 2 Peters, [illegible] 3 7 Wallace, [illegible]

sale, when made, was without redemption; and that it was so is expressly stated by Chief Justice TANEY in *Bronson* v. *Kinzie*,[1] speaking of the first statute of Illinois giving redemption from such sales, and is clearly, as is stated in the argument of Mr. PADDOCK, shown in *Williams* v. *Waldo*.[2] The procedure and mode of executing decrees in the Federal circuit court conformed, *then*, as *now*, to the usage of the State court at that time; and it is conformable to that in the English court of chancery.

In February, 1841, the legislature of Illinois passed an act, giving for the first time a right of redemption after the foreclosure sale, during the period of one year to a debtor and of fifteen months to a judgment creditor. The practice of the Federal circuit court has continued as it was in 1828, and that court has not adopted the change made by the State legislature.

Here is then a "mode of executing decrees," which preserves to the defendant before a sale, his day for the payment of the mortgage; which conforms to the English chancery procedure by which the sale, when made, is without redemption; which is founded distinctively upon the act of congress of 1828, and which no later act of congress or rule of any court has changed. Nevertheless, it is claimed now that the act of the legislature of Illinois has made this practice error in the Federal circuit court. Few principles have been announced more frequently, or with greater emphasis, in this court, than that of the absolute inviolability of the Federal procedure and process by the States. They are powerless to affect it, and must, in the nature of things, be so, if Federal sovereignty and jurisdiction are to be upheld. "No State law," said this court in *McCracken* v. *Hayward*[3] "passed "since May, 1828, can have any effect on the proceedings on "executions issued from the courts of the United States, unless "such laws are adopted by those courts under the proviso in "the third section of the act." That no State has any inde-

1. 1 Howard, 312. 2. 3 Scam. (IV Ill.), 364. See also Johnson *vs.* Donnell, 15 Ill., 98.
3. 2 Howard, 618.

pendent power to control the modes of proceeding in suits in the courts of the United States is, said Chief Justice MARSHALL, in *Wayman* v. *Southard*,[1] "one of those political axioms, an "attempt to demonstrate which, would be a waste of argument "not to be excused." Where the United States circuit court had, under the act of congress, adopted by rule where the English practice prevailed, the practice of the State courts, it was held[2] improper to depart from it because the State practice was subsequently changed, without first altering the rule so as to introduce the new practice by authority of the act of congress. All this matter, so familiar in this court, is so settled as to be outside the sphere of discussion. Nevertheless, it is contended that the Illinois statute of 1841, is of its own force binding, without adoption by rule, upon the circuit court of the United States, and compels the officers of those courts in executing their equity decrees of foreclosure to follow that statute, and sell the land subject to the redemption directed in that statute. No other element of error is assigned.

The claim is rested primarily upon principles supposed to be announced in this court in the cases of *Bronson* v. *Kinzie*,[3] and *McCracken* v. *Hayward*.[4] But it seems to us that the question there passed upon by the court does not arise here; and that the question here presented, though it might have been raised in those cases, and would have been sufficient to uphold the result arrived at by the court, was passed over in order to determine other important questions which do not arise here. The dissenting opinion of Mr. Justice MCLEAN in *Bronson* v. *Kinzie* is upon the ground that, while he agreed to the answers given by the court to the points certified, he thought the court should rely upon the proposition we rely upon here — namely, that the State statute, not having been adopted by the Federal court, *did not apply in the case* — and should not proceed so far as to discuss the State law, and hold it unconstitutional. Now, in that case Bronson had a mortgage made in 1838, when by the State law foreclosure sales were

1 10 Wheat. 49. 2 1 Peters, C. C. 1. 3 1 Howard, 311.
4 2 Howard, 608.

without redemption after the sale, and when the same method had been established in the Federal circuit court, by the act of congress of 1828. The State law and the Federal law upon this subject were then the same. In both the form of decree was the same as in the English chancery,[1] when sales were made. Afterwards, before decree of foreclosure, the legislature of the State passed the statutes of February 19th and 27th, 1841, the latter one being enacted while the foreclosure suit was pending. The first gave a fixed period of redemption after the sale, and the second declared, that before sale under foreclosure decree, as well as under executions at law, the land should be valued, and should not be sold unless two-thirds of the valuation should be bid therefor. In *McCracken* v. *Hayzard* the plaintiff obtained a judgment in June, 1840. Afterwards, and before execution issued, the above laws were passed. I think it is agreed in the opinions in these cases, that the laws in question were laws affecting the *remedy* under the contracts; but they assert that the legal remedies are so interwoven with the rights under the contract, that a law "professing to act only on the remedy" may "so change the "nature and extent of existing remedies" as to "amount to a "denial or obstruction of the rights accruing by a contract," and so impair the obligation of the contract to an extent obnoxious to the prohibition of the constitution. The case of *Gantley's Lessee* v. *Ewing*,[2] was identical in circumstance with these. The court there also said that a change in the State law affecting an existing mortgage, "imposing conditions and restrictions on "the mortgagee in the enforcement of his contract, and which "affected its substance impaired the obligation and could not "prevail." But we have in the present case no change in the State law, nor any new State law affecting existing mortgages. No new State law has come into force impairing existing contracts. That is not the question here. But the question is whether, when by act of congress such as that of 1828 the mode of proceeding upon final decrees in the courts of the United States is fixed, those courts *must* thereafter change their

1. 5 Wallace, 323. 2. 3 Howard, 707.

methods as the State legislatures may direct? In *Bronson* v. *Kinzie* the court decides, that where by the State law and the Federal law alike, no time of redemption after sale exists, no new State law can engraft it upon an existing mortgage. Conversely, it is doubtless true, that when under like provisions of law such a redemption is given, no new State law can detach it from an existing mortgage. But that is far enough, it appears to us, from holding that when the mode of executing decrees is once fixed in the circuit courts by act of congress or by rules adopted under authority of congress, this mode in the Federal courts can be changed, and shifted back and forth thereafter by the State legislature at its will, and by its own inherent power. It decided that the State enactment was unconstitutional as affecting existing mortgages. It did not decide that if it had been free from constitutional objection it would, without adoption by authority of congress, *apply in the Federal courts* and control their procedure. We think, therefore, that the question passed upon in the above cases does not arise here. It may be readily seen that this, being an ancient method of procedure and founded on an act of congress, is not a State law impairing the obligation of a contract. The contract, namely the mortgage in question here, when it came into being, found this Federal law and procedure already here. The rule under objection is in the first place not a State law at all, but Federal; and in the second place, it is not a law or procedure created to impair the obligation of any contract, because it ante-dates the contract in question altogether, and was in force to dominate that contract before and when it was made. Nothing in these cases, therefore, is an authority opposed to the decree in question here, or to the mode of executing such decrees in the circuit court. On the contrary, the opinion of Mr. Justice McLEAN in *Bronson* v. *Kinzie*, —arguing with great force and *upon the precedents of the court*, that it ought to hold these laws inoperative merely because not having been adopted they *did not apply* in the Federal courts, and that it ought not to go on to declare them unconstitutional in their effect upon the mortgage in question.

shows in the clearest light, that the court intended to decide nothing in contravention to the ground favored by Judge McLEAN, but simply to determine the cause upon other and independent considerations.

This suggestion receives the strongest confirmation in the fact, that for twenty years thereafter Mr. Justice McLEAN sat in the circuit in which that cause arose, and to the end of his life pursued the usage now called in question. The same method has been followed by Mr. Justice DAVIS, and by Judge DRUMMOND, and by Judge BLODGETT. Certainly these eminent judges have not supposed they were proceeding in contravention of the principles asserted in *Bronson* v. *Kinzie*; and no one can read the opinion of Mr. Justice McLEAN, without conviction that he knew very well the views of the court in that case, and the intended scope of the decision.

There being, therefore, no decision of this court in these cases upon the question at issue here, the binding effect of this State statute upon the courts of the United States must be derived from elsewhere, if at all. It is said that this time for redemption *after* sale is not a mere form of executing final process, but is a matter of substantial right, a rule of property, an estate in land created by State law by which the Federal courts must be governed. The question whether it is a rule of property entitled to govern in the Federal courts as such, seems to find complete analogy in the questions which have arisen under the 34th section of the judiciary act of 1789, which enacts:

> "That the *laws of the several States*, except where the constitution, "treaties, or statutes of the United States shall otherwise require or "provide, shall be *regarded as rules of decision* in trials at common "law, in the courts of the United States, *in cases where they apply*."

What laws of the States must be regarded as "*rules of decision*," in proceedings at common law, and as "*rules of property*" governing even in an equity cause must, as distinguished from laws relating to practice and process, be determined by the same *criteria*. Upon this subject, Mr. Justice

BALDWIN, who wrote the opinion in *McCracken* v. *Hayward*, said in *Thompson* v. *Phillips*:[1]

"Laws which relate to practice, process, or modes of proceeding "before or after judgment, are exceptions to the thirty-fourth section, "as congress have legislated on the subject. The supreme court of "the United States have established the distinction to be this: State "laws which furnish the court a *rule for forming a judgment*, are bind- "ing on the Federal courts, *not laws for carrying that judgment into* "*execution*, that is governed by the acts of congress and the rules and "practice adopted pursuant thereto."

Chief Justice MARSHALL in *Wayman* v. *Southard*,[2] said this section was regarded "as furnishing a rule to *guide the court in* "*the formation* of its judgment: *not* one for *carrying that judg-* "*ment into execution*. It is a 'rule of decision,' and the *proceed-* "*ings after judgment are purely ministerial*. It is, too, 'a rule of "decision in trials at common law': a phrase which presents "clearly to the mind the idea of litigation in court, and *could* "*never occur to a person intending to describe an execution or* "*proceedings after judgment, or the effect of those proceedings.*" So it is necessary to inquire whether these statutes of redemption are "rules of property," or "rules of decision," as distinguished from rules of practice or modes of executing process: or, whether in the language of the Chief Justice in the same case—"they *regulate the conduct of the officer* serving the exe- "cution," or executing the decree. Now, things which are equal to the same thing are equal to each other: and by the laws of Illinois mortgages could always be foreclosed by *scire facias* at common law, as well as by proceedings in chancery: and these statutes of redemption apply equally to the execution in one case and the decree in the other. Unless, therefore, these statutes giving a time of redemption after the sale, directing the officer to make first a certificate of sale and to make a deed only after the interval of a year or fifteen months, as the case may be, are in a proceeding by *scire facias*, "rules of decision to "guide the court in the formation of its judgment" in the issues

1. 1 Baldwin, R. 74. 2. 1 Wheat. 1.

that may be raised on the trial upon the mortgage, then in an equity cause they are not rules of property: "they *regulate* "*the conduct of the officer*" executing the decree: they direct "proceedings *after judgment*" "merely ministerial," and establish a mode of executing final process. Of course, these statutes are never involved as rules of decision in a *scire facias* proceeding at common law. Their requirements never enter into the conclusions of the court in such a proceeding or into the decree in equity in the courts of the State. They regulate the conduct of the officer executing the final process, whether an execution or a decree: and that such process in the Federal courts is beyond the effect of State legislation, is "a political "axiom, an attempt to demonstrate which, would be a waste "of argument not to be excused."

But assuming for the sake of the argument that these statutes represent as is claimed a substantial right, a rule of property, what is the legitimate consequence of a new State enactment of that character? Certainly not to change the procedure or process established by congress in the courts of the United States. If a new right is created by State law, the Federal courts will give effect to it through the instrumentality of their own forms and methods so far as they furnish the means of doing so. That a State law creating a new right and prescribing modes of giving effect to it is obligatory upon all State tribunals is not to be questioned; but in the Federal court it can have effect only through the established procedure of those courts. This is well settled. In *Bank of Hamilton* v. *Dudley's Lessee*,[1] it was held that the occupying claimant law of Ohio "was a "*rule of property and decision* in the Federal courts, but that "they *could not carry it into effect by changing their modes of pro-* "*ceeding* as established and regulated by practice and the acts "of congress, though the right of the party to the benefit of "the law was not impaired by the inability of the court to act "upon it *in the manner directed*." This is the language of Mr. Justice BALDWIN in *Thompson* v. *Phillips*.[2] Admitting this

1 2 Peters, 492. 2 1 Peters, 213. 3 Ibid., 220.

law to be a rule of property and of decision, said Chief Justice MARSHALL, in *Bank of Hamilton* v. *Dudley's Lessee*, *supra*, "still that legislature cannot change radically the mode of pro-"ceeding prescribed for the courts of the United States, or "direct these courts, in a trial at common law, to appoint com-"missioners for the decision of questions which a court of com-"mon law must submit to a jury." In *Fitch* v. *Creighton*,[1] it was claimed in argument by Mr. SWAYNE that while States cannot direct a remedy which Federal courts are bound to pursue, yet that "when the statute of a State creates a right which "may be enforced by remedies already existing and resorted to "in the latter courts, that *these courts will enforce the right by* "*their own known remedies and usages*, in cases where they "have jurisdiction, *although the local statute may direct a special* "*mode of proceeding*": and the position was sustained by the court.

But what, after all, is the constitutional right, the estate, the rule of property represented by these statutes? That an *equity of redemption* is all this, we freely concede. But what is the equity of redemption? At common law, if the mortgage debt was not paid upon the day, the estate of the mortgagee became absolute in the mortgaged lands, the condition being broken. Courts of equity to lighten this hardship allowed the debt to be paid and the land redeemed after the day and after condition broken. Gradually this favor of a court of equity came to be regarded as a settled right, as an equitable estate in the mortgagor after condition broken, and men began to file bills in chancery to foreclose and bar this equity, and upon such bills, time for payment of the debt was always, says Mr. Justice SWAYNE, "an *incident of the remedy*."[2] It grew into an estate incident to the mortgage, which the mortgagor could not by any covenant or agreement in the mortgage waive or extinguish if he would. Now we are referred in argument to various authorities, which declare that this *equity of redemption* is an estate and a rule of property. But it does not follow, that every

1. 24 Howard, 159. 2. *Clark* v. *Reyburn*, 8 Wallace, 340.

form and method, that from time to time may be adopted by legislative enactment in the respective States for giving effect to it, constitutes an element in this estate or rule of property. These cases assert that the equity of redemption, which rescues the mortgagor from the rigorous effect of the condition at law, has become a settled right of property. None of these, however, hold that any particular *mode* of securing that right is itself an estate in land and a right of property which is binding on the procedure of the Federal courts. And it seems very clear that these statutes now in question do not of themselves create any new estate, but that they are merely one of several methods and modes of practice provided by the laws of Illinois for giving effect to the equity of redemption which is a right, older than these statutes, and is undoubtedly, under some form, a substantial right. For example: before these statutes of 1841 substituted a period of redemption *after* the sale, it was the practice to give a considerable period therefor *before* the sale, as is now the practice questioned here, of the Federal court. And this time was, as in the Federal court, held subject to the control of the court and might be extended in its discretion.[1] Such is the rule in the English chancery. But since these statutes have come into force it is *usual to dispense* with time for payment before sale, and to direct that the debt be paid in twenty, ten, or even five days, or that the master make sale.[2] On the other hand the practice of strict foreclosure, without sale, is allowed by the State law; but in such cases it is *held* that reasonable time should be given *before* the final decree, and that this time should not be less than the life-time of an execution, namely, ninety days.[3] These various regulations show that it is not the time of redemption *after sale* but the equity of redemption preventing the estate of the mortgagee becoming absolute,[4] which constitutes this inviolable *rule of property*, this *estate* in the mortgagor which is insisted upon; and that the statutes in question embody merely one mode of practice, one method of

1. *Williams* v. *Waldo*, 3 Scam., 264. *Clark* v. *Reyburn*, 8 Wall., 22. *Johnson* v. *Donnell*, 15 Ill., 98. 2. *Moore et ux* v. *Titman*, 33 Ill., 367. 3. *Farrell* v. *Farlier*, 59 Ill., 275. *Link* v. *Arck. Iron Works*, 24 Ib., 552. 4. Story Eq. Juris., §§ 1012, 1013 and 1015.

giving effect to this rule of property, and of protecting this estate.

In this respect the case of *Clark* v. *Reyburn*, is very significant. There a decree of foreclosure had been entered which did not find the amount due on the mortgage, and "allowed no "time for the payment of the debt and the redemption of the "estate," but barred and foreclosed the redemption in the first instance. The question in this court was, if such a decree could be sustained? It was held that the *equity of redemption*, is a distinct estate from that vested in the mortgagee before or after condition broken, and must be protected by some mode of procedure, giving time for the payment of the debt after condition broken, and after the estate of the mortgagee became indefeasible at law: that, no rule of practice upon that subject in the court below being adduced, the practice must under the 90th equity rule be regulated by that of the High Court of Chancery in England: that in that court it was settled practice to give time for payment of the debt before foreclosure, and that a decree absolute in the first instance could not be sustained.

It follows, therefore, that while such a rule of procedure, governing the conduct of the officer executing the decree, cannot be imposed by the legislature upon the courts of the United States, those courts, nevertheless, do by their own forms and modes of procedure and process give effect to the equity of redemption to the full extent that it constitutes a rule of property, or an estate in the mortgagor.

This stand-point seems to give a proper view of the extent to which the State laws existing at the time of a contract enter into its terms. A State law which furnishes a rule of property, a rule of decision within the meaning of the 34th section of the judiciary act, must enter into and control the contract: but "laws which relate to practice, process or modes of proceeding "before or after judgment, are exceptions to the 34th section."[1]

1 *Thompson* v. *Phillips*, 1 Bald., 274. *Wayman* v. *Southard*, 10 Wheat., 23.

Such laws relate only to the means for carrying a judgment or decree into execution. They govern necessarily the procedure in the State forum in which they apply. In that forum both jurisdiction and process are subject to legislative regulation. But the procedure and process of the courts of the United States are inviolable by the State legislatures. The law which dominates the contract and all parties to it, and empowers them to invoke for its enforcement the jurisdiction of the Federal courts, empowers them to invoke with that jurisdiction the methods and process by which that jurisdiction is exercised. The Federal law by which parties may choose the forum of the federal courts certainly enters into the contract as effectively as any State law giving jurisdiction to State courts; and what reason can be assigned why the forms of remedy and modes of proceeding established by acts of congress for administering the jurisdiction of the Federal courts, do not enter into the contract of parties with the same effect as State laws prescribing the modes and incidents of remedy in State courts? If the appellee contracted by implication to exclude the procedure, while it could not but retain the jurisdiction of the courts of the United States, then those courts must change their equity practice, without reference to the law of 1828, whenever the State legislature sees fit to change its laws.

Finally, it seems to us, that the practice in question here is in contravention of no rule or principle established by this court; that it upholds the equity of redemption, by modes of procedure established for the circuit court by act of congress, to the full extent to which that equity of redemption exists as a rule of property; and that the practice and process founded upon acts of congress, by which the jurisdiction of the Federal courts is exercised, enter into the contract of parties as much as the law which entitles him to seek the jurisdiction of those courts.

The mode of executing these decrees impugned in this cause has been in use for more than fifty years. The titles to prop-

erty of value not to be estimated rest upon it; and the value of titles thus acquired, even within the last two years, can be estimated only by many millions. These lands have been sold to persons purchasing upon the faith of these decrees, and it is reasonable to suppose that they have in numerous cases been transferred to subsequent purchasers. It would seem that a procedure so long acquiesced in and approved by the profession and maintained by the courts, should be disturbed only upon the gravest considerations.

We ask leave to file in this cause for the information of the court, and to append, by copy, to this argument, a certificate of the Hon. Thomas DRUMMOND, judge of the circuit court, and of the Hon. Henry W. BLODGETT, judge of the district court for the Northern District of Illinois, showing that the State statutes of 1841 have not been adopted, and that the practice of this court has continued as it is since the year 1828.

Edwd. J. Isham.

IN THE

Supreme Court of the United States.

No. 288.

EMERSON G. ORVIS, Appellant,

vs.

NATHAN POWELL, Appellee.

Argument of Edward S. Isham, for Appellee.

ISHAM & LINCOLN, Solicitors, &c.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
Corner of 9th and D streets.
1878.

ARGUMENT.

I propose to argue in this cause only the single question presented by the sixth assignment of error made by Mr. Fuller. It is the question which we have discussed also in Number 279, *Brine* v. *The Hartford Fire Insurance Company*, and which arises in Number 508, *The Metropolitan National Bank* v. *The Connecticut Mutual Life Insurance Company*. It calls in question the mode of executing decrees in equity, in foreclosure of mortgage, which has been the settled usage of the circuit court in which these causes have arisen for more than fifty years.

A statute of Illinois provides that when making sales of land under decrees of foreclosure the master shall make to the purchaser, not a deed but a certificate; that thereafter for a year the mortgagor, and for fifteen months his judgment creditor, may pay the debt and redeem from the sale; and that the master shall make his deed to the purchaser only after fifteen months shall have thus expired without redemption. It is claimed that this statutory procedure by the master executing the decree is obligatory upon the courts of the United States, and that their own ancient practice is abrogated by the legislature of Illinois. It is assigned as error that the *decree* ordering a foreclosure sale *omits to provide for* such redemption from the sale as is allowed by the statute of Illinois, in force when the mortgage was made.

The form in which the question arises may be clearly and concisely shown. The act of Congress of September 29, 1789, provided as follows:

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common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the *forms and modes of proceedings* in causes of *equity*, and of admiralty and maritime jurisdiction, *shall be according to the course of the civil law*."

This statute was from time to time continued in force until the act of Congress of May 8, 1792, which provided as follows:

"That the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of *common law*, shall be the same as are now used in the said courts respectively in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' *in those of equity* and in those of admiralty and maritime jurisdiction, *according to the principles, rules, and usages which belong to courts of equity* and to courts of admiralty respectively, *as contradistinguished from courts of common law*, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time by rule to prescribe to any circuit or district court concerning the same."

The equity procedure of the federal circuit courts therefore rested upon the provisions of the Constitution, and upon those acts of Congress until May 19th, 1828. By the act of Congress of that date, it was provided as follows:

"That the forms of mesne process, except the style, and the *forms and modes of proceeding* in suits in the courts of the United States, held in those states admitted into the Union since the 29th day of September, in the year seventeen hundred and eighty-nine, in those of *common law*, shall be the same in each of the said states, respectively, as are now used in the highest court of original and general jurisdiction of the same, *in proceedings in equity, according to the principles, rules, and usages which belong to courts of equity*, and in those of admiralty and maritime jurisdiction, according to the principles, rules, and usages which belong to

courts of admiralty, *as contradistinguished from courts of common law*, except so far as may have been otherwise provided for by acts of Congress; subject, however, to such alterations and additions as the said courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same." [4]

"That writs of execution and *other final process* issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, saving to the courts of the United States, in those states in which there are not *courts of equity, with the ordinary equity jurisdiction*, the power of prescribing the mode of executing their decrees in equity by rules of court: *Provided, however*, That it shall be *in the power* of the courts, if they see fit *in their discretion, by rules of court*, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts."

Throughout these enactments the intention is conspicuous to distinguish between remedies and procedure at common law and in equity, in reference to this matter of conformity to the regulations of the respective states. While the proceedings and process at common law are conformed to those of the states, the modes of proceeding in equity causes are required to conform to the principles and usage of the equity tribunals of the parent country, from which we derive the principles and methods of our equity jurisprudence and judicature. The same principle is enforced by the 90th equity rule, and by the reservation of the equity procedure in the revised statutes. There appears, therefore, to be a settled policy that the whole administration of remedies in equity, and the modes of executing decrees, should stand peculiarly apart from the varying modes in operation in the respective states, and should everywhere conform to the principles and practice of the

English courts of equity, except as altered by acts of Congress, or the rules of the courts made in the exercise of powers delegated by those acts. Accordingly, in *Robinson* v. *Campbell*, 3 *Wheat.*, 223, the court said:

"The court, therefore, think that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

Fenn v. *Holme*, 21 H., 484.

And in *Boyle* v. *Zacharie*, 6 *Peters*, 658, in 1852, the court said:

"The chancery jurisdiction given by the Constitution and laws of the United States, is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of Congress of 1792, c. 36, has provided that the modes of proceeding in equity suits shall be according to the *principles, rules, and usages* which belong to courts of equity, as contradistinguished from courts of law. And the *settled doctrine of this court is* that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of Congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may from time to time prescribe."

In *Payne* v. *Hook*, 7 *Wallace*, 429, the court said:

"If *legal remedies* are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, *it is not so with equitable*. The equity jurisdiction conferred on the federal courts, is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.

Now, in the year 1828, the State of Illinois had courts of equity having "ordinary equity jurisdiction;" and it was

the practice of those courts in decrees of foreclosure, to give certain time for the payment of the debt, and to order sale of the premises mortgaged, if the debt was not paid within the time allowed. This sale, when made, was without redemption after the sale, and that it was so is expressly stated by Chief Justice TANEY in *Bronson* v. *Kinzie*, 1 *Howard*, 312, speaking of the first statute of Illinois giving redemption from such sales, and is clearly shown in *Williams* v. *Waldo*, 3 *Scam.*, 264, and also in *Johnson* v. *Donnell*, 15 *Ill.*, 98. The procedure and mode of executing decrees in the federal circuit court conformed, *then*, as *now*, to the usage of the state court at that time; and in both it then conformed to that of the English court of chancery.

In February, 1841, the legislature of Illinois passed an act, giving for the first time a right of redemption after the foreclosure sale, during the period of one year to a debtor and of fifteen months to a judgment creditor. The practice of the federal circuit court has continued as it was in 1828, and that court, as shown by the certificate we have asked leave to file in Number 279, has not adopted the change made by the state legislature.

Here is then a "mode of executing decrees," which preserves to the defendant before a sale, his day for the payment of the mortgage; which conforms to the English chancery procedure by which the sale, when made, is without redemption; which is founded distinctively upon the act of Congress of 1828, and which no later act of Congress or rule of any court has changed. Nevertheless, it is claimed now that the act of the legislature of Illinois has made this practice error in the federal circuit court. Few principles have been announced more frequently, or with greater emphasis, in this court, than that of the absolute inviolability of the federal procedure and process by the states. They are powerless to affect it, and must, in the nature of things, be so, if federal sovereignty and jurisdiction are to be upheld. "No state law," said this court in

McCracken v. *Hayward*, 2 *Howard*, 615, "passed since May, '1828, can have any effect on the proceedings on executions 'issued from the courts of the United States, unless such 'laws are adopted by those courts under the proviso in the 'third section of the act." That no state has any independent power to control the modes of proceeding in suits in the courts of the United States is, said Chief-Justice MARSHALL, in *Wayman* v. *Southard*, 10 *Wheat.*, 49, "one of 'those political axioms, an attempt to demonstrate which 'would be a waste of argument not to be excused." Where the United States circuit court had, under the act of Congress, in a circuit where the English practice prevailed, adopted by rule the practice of the state courts, it was held, 1 *Peters C. C.*, 1, improper to depart from it again because the state practice was subsequently changed, without first altering the rule so as to introduce the new practice by authority of the act of Congress. All this matter, so familiar in this court, is so settled as to be outside the sphere of discussion. Nevertheless, it is contended that the Illinois statute of 1841, is of its own force binding, without adoption by rule, upon the circuit court of the United States, and compels the officers of those courts in executing their equity decrees of foreclosure to follow that statute, and sell the land subject to the redemption directed in that statute. No other element of error is assigned.

The claim is rested primarily upon principles supposed to be announced in this court in the cases of *Bronson* v. *Kinzie*, 1 *Howard*, 319, and *McCracken* v. *Hayward*, 2 *Howard*, 612. But it seems to us that the question there passed upon by the court does not arise here; and that the question here presented, though it might have been raised in those cases, and would have been sufficient to uphold the result arrived at by the court, was passed over in order to determine other important questions which do not arise here. The dissenting opinion of Mr. Justice McLEAN in *Bronson* v. *Kinzie* is upon the ground that, while he agreed to the answers given by the court to the points certified, he

thought the court should rely upon the proposition we rely upon here — namely, that the state statute, not having been adopted by the federal court, *did not apply in the case*—and should not proceed so far as to discuss the state law and hold it unconstitutional. But the question of constitutionality there passed upon does not arise here. In that case Bronson had a mortgage made in 1838, when by the state law foreclosure sales were without redemption after the sale, and when the same method had been established in the federal circuit court by the act of Congress of 1828. The state law and the federal law upon this subject were then the same. In both the form of decree was the same as in the English chancery, (8 Wallace, 323,) when sales were made. Afterwards, before decree of foreclosure, the legislature of the state passed the statutes of February 19th and 27th, 1841, the latter one being enacted while the foreclosure suit was pending. The first gave a fixed period of redemption after the sale, and the second declared, that before sale under foreclosure decrees, as well as under executions at law, the land should be valued, and should not be sold unless two-thirds of the valuation should be bid therefor. In *McCracken* v. *Hayward* the plaintiff obtained a judgment in June, 1840. Afterwards, and before execution issued, the above laws were passed. I think it is agreed in the opinions in these cases, that the laws in question were laws affecting the *remedy* under the contracts; but they assert that the legal remedies are so interwoven with the rights under the contract, that a law "professing to act only on the remedy" may "so change the nature and extent of existing remedies" as to "amount to a denial or obstruction of the rights accruing by a contract," previously existing, and so impair the obligation of the contract to an extent obnoxious to the prohibition of the Constitution. That this is the scope of those cases is now explicitly held in the case just decided of *Edwards* v. *Kearzy*. The case of *Gunlegh's Lessee* v. *Ewing*, 3 *Howard*, 708, was identical in circumstance with these. The court there also said that a

change in the state law affecting an existing mortgage, "imposing conditions and restrictions on the mortgagee in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail." But we have in the present case no change in the state law, nor any new state law affecting existing mortgages. No new state law has come into force impairing existing contracts. That is not the question here. But the question is whether, when by act of Congress such as that of 1828, the mode of proceeding upon final decrees in the courts of the United States is fixed, those courts *must* thereafter change their methods as the state legislature may direct? In *Bronson* v. *Kinzie* the court decides that where by the state law and the federal law alike no time of redemption after sale exists, no new state law can engraft it upon an existing mortgage. Conversely, it is doubtless true, that when under like provisions of law such a redemption is given, no new state law can detach it from an existing mortgage. But that is far enough, it appears to us, from holding that when the mode of executing decrees is once fixed in the circuit courts by act of Congress or by rules adopted under authority of Congress, this mode in the federal courts can be changed, and shifted back and forth thereafter by the state legislature at its will, and by its own inherent power. It decided that the state enactment was unconstitutional as affecting existing mortgages. It did not decide that if it had been free from constitutional objection it would, without adoption by authority of Congress, *apply in the federal courts* and control their procedure.

These cases are a declaration, that although a state legislature may be dealing with forms of remedy, only with modes of procedure and process—matters in which it is powerless to affect the federal courts—it may still in these matters affect the interests of parties to contracts so seriously as to bring the legislative act within the principle and scope of the constitutional inhibition, and make it void even in the state courts. In *Edwards* v. *Kearzy* this court

declares that stay laws are void because they are in conflict with the national Constitution; but that such statutes would control the courts of the United States if they did not amount by their degree of interference, to a conflict with the Constitution is a proposition of a different sort, with which these cases have nothing to do, and which is advanced here for the first time. Laws which *amount to a denial* or obstruction of the rights accruing by a contract, may well be held void as to prior existing contracts, and still leave untouched the question of their compulsory operation upon the future procedure of the courts of the United States. We think, therefore, that the question passed upon in the above cases does not arise here. It may be readily seen that this, being an ancient method of procedure and founded on an act of Congress, is not a state law impairing the obligation of a contract. The contract, namely the mortgage in question here, when it came into being, found this federal law and procedure already here. The rule under objection is in the first place not a state law at all, but federal; and in the second place, it is not a law or procedure created to impair the obligation of any contract, because it antedates the contract in question altogether, and was in force to dominate that contract before and when it was made. A present law cannot impair the obligation of a future contract. Yet these cases go altogether on the question of impairment of the obligation of a contract. The statute in question is presented here under another aspect, and in its relations to different principles and different contracts. It is no longer a question of a state law interfering with the means of enforcement of a contract to such a degree as to amount to a destruction or denial of the rights under the contract. It is a question whether, where two *fora* exist for the enforcement of a contract, the federal and the state courts, each having complete and independent jurisdiction, and each having settled methods of enforcement long in use and older than the contract, and founded on the legislative authority of its own sovereignty,

a state law like this can abrogate the methods of the United States courts and substitute new ones. Nothing in these cases, therefore, is an authority opposed to the decree in question here, or to the mode of executing such decrees in the circuit court. On the contrary, Mr. Justice McLEAN, in *Bronson* v. *Kinzie*, argued with great force and *upon the precedents of the court*, that it ought to hold these laws inoperative merely because not having been adopted they *did not apply* in the federal courts, and that it ought not to go on to declare them unconstitutional in their effect upon the mortgage in question.

He called attention as such precedents to the case of *Wayman* v. *Southard*, 10 W., 50, where Chief Justice MARSHALL said that if the laws did "not apply to the federal courts no question concerning their constitutionality could arise in those courts;" and to the case of *U. S. Bank* v. *Halstead*, 10 W., 53 and 65, where it was held that as appraisement statutes of Kentucky, like this of Illinois of 1841, which directed appraisals of property on which execution was levied, did not apply so as to govern the conduct of the marshal, it was "unnecessary to inquire into the constitutionality of the law of Kentucky."

So Mr. Justice CATRON, in *McCracken* v. *Hayward*, 2 H., 617, said of this statute of Illinois of February 27, 1841, about appraisal: "And not having been adopted, it is not before this court for construction; and it is unnecessary and improper to inquire into the constitutionality of the state law, as the laws in force in 1828 must govern. I have formed no opinion whether the statute of Illinois is constitutional or otherwise."

These opinions show in the clearest light, that the court intended to decide nothing in contravention to the ground favored by Judge McLEAN, but simply to determine the cause upon other and independent considerations.

This suggestion receives the strongest confirmation in the fact, that for twenty years thereafter Mr. Justice

McLEAN sat in the circuit in which that cause arose, and to the end of his life pursued the usage now called in question. The same method has been followed by Mr. Justice DAVIS, and by Judge DRUMMOND, and by Judge BLODGETT. Certainly these eminent judges have not supposed they were proceeding in contravention of principles asserted by this court in *Bronson* v. *Kinzie*, or elsewhere; and no one can read the opinion of Mr. Justice McLEAN, without conviction that he knew very well the views of the court in that case, and the intended scope of the decision.

There being, therefore, no decision of this court in these cases upon the question at issue here, the binding effect of this state statute upon the courts of the United States must be derived from elsewhere, if at all. Nothing is clearer than that if this is matter of process only, in the aspect which it presents as it arises here, the state statute is forceless in the federal courts.—(*Bronson* v. *Kinzie*, 1 H., 314–15. But it is said that this time for redemption *after* sale is not a mere form of executing final process, but is a matter of substantial right, a rule of property, an estate in land created by state law by which the federal courts must be governed. Now the statute in question here is the same one discussed in *Bronson* v. *Kinzie*. But it stands here in its relations, not to the disability of the state to impair a contract, but in its relations to the disability of the state to control or impair the jurisdiction or process of the tribunals of this sovereignty. As on the one hand it has been carefully guarded by the wisdom of this court that state laws professedly acting only on remedies shall not amount to a denial of a contract right, so on the other hand state laws professedly acting only on rules of property ought not to touch the process of these courts, nor their modes of executing their decrees in equity. In this aspect the question is assuredly an important one in this court. I think that a state law, purporting to be purely a rule of property, is powerless if it impairs or bears upon the free-

dom of action of these courts in carrying into effect the matters they have established by their adjudications and decrees. And on this side we also may use the language approved in *Edwards* v. *Kearzy*, that "this is not a question of degree or manner or cause, but of encroaching in any respect."

Now the question whether a statue is a rule of property entitled to govern in the federal courts as such, seems to find complete analogy in the questions which have arisen under the 34th section of the judiciary act of 1789, which enacts:

"That the *laws of the several states*, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be *regarded as rules of decision* in trials at common law, in the courts of the United States, *in cases where they apply*."

This court has declared that this section as construed by the court, is but the "recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it is made." These are the words of Chief Justice MARSHALL, 10 W., 48. But it is not every *lex loci* which governs a contract in another forum. We must get the distinction between those *leges loci* which govern in every forum, which give rules of decision under this 34th section, and those which do not.

What laws of the states must be regarded as "*rules of decision*," in proceedings at common law, and as "*rules of property*" governing federal courts even in an equity cause must, as distinguished from laws relating to practice and process, be determined by the same *criteria*. Upon this subject, Mr. Justice BALDWIN, who wrote the opinion in *McCracken* v. *Hayward*, said in *Thompson* v. *Phillips*, 1 Bald., 274:

"Laws which relate to practice, process, or modes of proceeding before or after judgment, are exceptions to the thirty-fourth section, as Congress have legislated on the

subject. The Supreme Court of the United States have established the distinction to be this: State laws which furnish the court a *rule for forming a judgment*, are binding on the federal courts, *not laws for carrying that judgment into execution*, that is governed by the acts of Congress and the rules and practice adopted pursuant thereto."

Chief Justice MARSHALL in *Wayman* v. *Southard*, 10 *W.*, 24, said this section was regarded "as furnishing a rule to 'guide the court in the formation of its judgment; *not* one for 'carrying that judgment into execution. It is a 'rule of decision,' 'and the *proceedings after judgment are purely ministerial*. 'It is, too, 'a rule of decision in trials at common law;' a 'phrase which presents clearly to the mind the idea of liti-'gation in court, and *could never occur to a person intending* 'to describe an execution or proceedings after judgment, or the 'effect of those proceedings." So it is necessary to inquire whether these statutes of redemption are "rules of property," or "rules of decision," as distinguished from rules of practice or modes of executing process; or, whether — in the language of the Chief Justice in the same case — "they *regulate the conduct of the officer* serving the execution," or executing the decree.

It will not be out of place to see what sort of laws this court has regarded as rules of property, rules of decision, proper to be observed and conformed to in the federal courts. On the one hand, *Swift* v. *Tyson*, 16 *P.*, 1, followed in many cases to *Boyce* v. *Tabb*, 18 *Wall.*, 546, have cut away all rules of general law, all laws except strictly local and positive statutes, and rights and titles to immovable and permanent things like land. On the other hand, *Wayman* v. *Southard*, 10 *W.*, 1, and many succeeding cases have established the inviolability of federal jurisdiction, procedure, and process.

In *Nichols* vs. *Levy*, 5 *Wall.*, 443, by the law of Tennessee, the court of chancery was empowered upon bill filed to subject equitable assets—except certain classes of trust estates—to the payment of judgments at law. Certain

judgment creditors filed a bill and asked the court to subject certain trust property to their judgments. The state court had held that under the statute this trust property was within the exception, and the federal courts followed that rule and held that the debtor had no such estate in the land as was liable under the statute to the judgment. But this was the very question at bar for the court to decide, whether the debtor had such an estate. The state law was one to guide the court in forming its conclusion whether the creditors had any right to the property at all; not one of the mode of making the money out of the property after judgment. It was a rule to determine *what the judgment* should be, not the mode of its execution. It was one to guide the court *before* judgment, not the ministerial office *after* judgment.

In *Jackson* v. *Chew*, 10 *W.*, 153, was a question whether the terms of a certain devise created under the law of New York an estate tail or an estate in fee simple defeasible upon a contingency;

In *Van Rensselaer* v. *Kearney*, 11 *H.*, 297, was a question whether a statute converting estates tail into absolute estates included estates tail in remainder as well as in possession;

In *Carroll* v. *Carroll's Lessee*, 16 *H.*, 275, was the question whether under a statute of Maryland a certain will was operative upon lands acquired after it was made;

These laws would operate in determining what the decrees of a court should be; but they did not bear upon the free action of the federal courts in their method of carrying their decrees into effect.

In *Meade* v. *Beale*, *Taney's C. C. Dec.*, 359, the question was whether a gift by will to an incorporated association of individuals, to take in succession, was valid or void by the law of Maryland.

The legislature of Kentucky, in 1796, to quiet the confusion of titles after the war, empowered any person having actual legal title and possession of lands to file a bill against

persons having junior claims—new patents for previously granted lands—to remove their clouds on his title, and treating such junior claimants as trustees for him to compel a release to him, removing their clouds on his title. In *Clark* v. *Smith*, 13 *P.*, 195, the question was if the federal court had jurisdiction to compel such a conveyance. This court held that it was like the power to order illegal and void instruments to be delivered up and cancelled; that it was but applying an *old practice* to a new right, and so was within the jurisdiction.

In *Thatcher* v. *Powell*, 6 *W.*, 119, in ejectment there was a question as to the validity of a tax-deed, executed professedly under the *revenue laws* of Tennessee. This court held that the summary proceedings of a state court exercising an extraordinary power under a special statute, must follow the statute, and must show their jurisdiction; that the construction of the state tribunals must determine whether that statute has been followed by that court; that the court derived its jurisdiction and power from the act of assembly, and not having complied with it, the order of sale it had made and the deed of the sheriff were as void as if the act had never been passed. The question in the federal court was whether the state inferior court had so far pursued a special statutory power as to make its act valid. There was no question affecting the action of the federal court in executing its judgment. But certainly the federal courts do not derive their jurisdiction and power to decree sales on mortgage foreclosure from any statute of any state.

Leffingwell v. *Warren*, 2 *Black R.*, 599, illustrates the same principle. Warren sued in ejectment. The defendant pleaded the statute of limitation. It is settled that such statutes are constitutional. The question was if the statute was a bar, and the court held that it was. But such statutes come to the consideration of the court in determining whether the party bringing the action at law or equity is entitled to any judgment in his favor at all or not, not

what shall be done by an officer in executing a judgment after it is rendered.

Of course, it is well settled that statutes of limitation or prescription of suits are "strictly statutes affecting the remedy."—(Story Conf., § 576.) They have no operation until a suit is brought. Therefore, those govern which are the law of the forum in which the suit is brought, *not those* which are *lex loci contractus*.—(Story Conf., § 577.) Nevertheless, and although they are strictly laws of remedy they come to the consideration of the court, if they come at all, *before* judgment, not after it. They determine whether there shall be *any remedy* and *so touch* the merits of the cause. (Story Conf., 579.) They guide the court in arriving at its judgment, not in executing it. Therefore, they are entirely distinguished from statutes *relating to process*—to proceedings after the judgment; and *so they are rules of decision* under the 34th section, though strictly statutes of remedy. But being statutes of remedy, those govern which are the law of the forum in which the suit is brought, *not* those which are the law of the place of contract. Now where an action is to be brought which is *in rem* or relating to immovable property, such as land, it must be brought where the *res*—the land—has its *situs*. But this requirement is answered when suit is brought in the federal court of the district where the land lies. If, therefore, ejectment or bill of foreclosure be brought in a federal court of Illinois, then in such case it happens that the place *rei sita*, and the place of contract, and the forum are geographically the same. Then if the statutes of limitation be pleaded, those of the State of Illinois must govern; but that is not because they happen to be the *lex loci contractus*, nor because they are in such case the *lex loci rei sitæ*, but because they are the *lex fori* affecting the remedy and determining whether there shall be any remedy.—(Story Conf., § 581, last three sentences.) It is said by Judge Story—(Conf. of Laws, § 579.)—that these prescriptive or limitation laws "cannot properly be de-

clared a right stipulated for or included in the contract," because they merely act upon it *ex post facto*, and "in *case of a suit*." This criterion seems to remand these laws of Illinois, which put the redemption after the sale, to their proper class. They act upon the mortgage contract only *ex post facto*, and *in case of a suit* brought. And, unlike the statutes of limitation, they *do not act upon it even then*. They do not act upon it until the complainant's cause of action and his charge on the land have been actually *established by judgment*. Then they act upon the mode of enforcing that judgment, and regulate the conduct of the officer after the judgment.

It seems that the principle is well stated in the case of *Adams et al.* v. *Watt*, 42 Vt. R., 23, where the court said:

"But it is said the cause of action in this case arose in Illinois, and that no such mode of enforcing judgments in such cases exists there. Whether the transaction between the parties *created a cause of action* in Illinois is a question that would depend upon the law of that state, but when the *cause of action is established*, and a *judgment rendered* thereon here, the mode of enforcing that judgment is determined by the law of this state, it having reference solely to the remedy."

In other cases this court has passed directly upon the character of such laws as this now in question.

In *Wayman* v. *Southard*, 10 W., 1, a statute of Kentucky, providing that unless a plaintiff would endorse on his execution that payment would be received in Kentucky banknotes, the defendant might stay the debt two years by giving a replevin bond to the officer, was held *not a rule of property*, but an act governing process only, and not operative in the federal courts. The period of two years given under the execution by this law was similar to the year given on executions and decrees by the Illinois statute in question.

In *Bank of U. S.* v. *Halstead*, 10 W., 51, *land* in Kentucky was held subject to execution out of the federal court without appraisement under the execution, though

not thus subject without appraisement by the state law in force at that time. The state law, therefore, the *lex loci* limiting the extent to which land in the state should be subordinate to the power of an execution, was held, not a rule of property governing the contract, but a regulation of process which did not apply in the federal court.

The same opinion was held as to this very statute now in question by Mr. Justice McLEAN in *Bronson* v. *Kinzie*, and by Mr. Justice CATRON in *McCracken* v. *Hayward*; but those cases passed in this court upon other considerations.

Plainly, rules of decision at common law, and rules of property governing at common law or in equity, must be distinguished from regulations governing an officer clothed with an execution or a decree by the same tests. Those laws which govern not the judgment of the court but the officer executing the decree are matters relating to process.

Now, things which are equal to the same thing are equal to each other; and by the laws of Illinois mortgages could always be foreclosed at common law by *scire facias*, as well as by proceedings in chancery; and these statutes of redemption apply equally to the execution in one case and the decree in the other. Unless, therefore, these statutes giving a time of redemption after the sale, directing the officer to make first a certificate of sale, and to make a deed only after the interval of a year or fifteen months, as the case may be, are, in a proceeding by *scire facias*, "rules of decision to guide the court in the formation of its judgment" in the issues that may be raised on the trial upon the mortgage, and during the "*litigation in court*," as said by Chief Justice MARSHALL, then in an equity cause they are not rules of property; "they *regulate the conduct of the officer*" executing the decree; they direct "proceedings *after judgment* merely ministerial," and establish a mode of executing final process. Of course, these statutes are never involved as rules of decision in a *scire facias* proceeding at common law. Their requirements never enter into the conclusions of the court

in such a proceeding or into the decree in equity in the courts of the state. It is impossible to see how they could be drawn in question before the court, except by a special application to the court for special directions to the master or marshal to act in compliance with them; and nothing could illustrate better than such an application how purely they relate to proceedings after judgment, and regulate the conduct of the officer. And all this is forcibly shown by Ch. J. MARSHALL, in *Wayman* v. *Southard*, 10 *W.*, *pp.* 25, 26. They regulate the conduct of the officer executing the final process, whether an execution or a decree; and that such process in the federal courts is beyond the effect of state legislation, is a "political axiom, an attempt to demonstrate which, would be a waste of argument not to be excused." It is certain that no instance has yet been adduced where a state statute, encroaching as this does upon the execution of decrees, controlling not the judgment of the court but the conduct of a ministerial officer after judgment and decree, has been held obligatory in the courts of the United States.

But assuming for the sake of the argument that these statutes represent as is claimed a substantial right, a rule of property, what is the legitimate consequence of a new state enactment of that character? Certainly not to change the procedure or process established by Congress in the courts of the United States. If a new right is created by state law, the federal courts will give effect to it through the instrumentality of their own forms and methods so far as they furnish the means of doing so. That a state law creating a new right and prescribing modes of giving effect to it is obligatory upon all state tribunals need not be questioned; but in the federal court it can have effect only through the established procedure of those courts. This is well settled. In *Bank of Hamilton* v. *Dudley's Lessee*, 2 *Peters*, 525, (13 *Peters*, 203,) it was held that the occupying claimant law of Ohio "was a *rule of property and decision* in the federal

'courts, but that they *could not carry it into effect by changing 'their modes of proceeding* as established and regulated by 'practice and the acts of Congress, though the right of the 'party to the benefit of the law was not impaired by the 'inability of the court to act upon it *in the manner directed*." This is the language of Mr. Justice BALDWIN in *Thompson* v. *Phillips*, 1 *Bald.*, 275. Admitting this law to be a rule of property and of decision, said Chief Justice MARSHALL, in *Bank of Hamilton* v. *Dudley's Lessee*, *supra*, "still that 'legislature cannot change radically the mode of proceed-'ing prescribed for the courts of the United States, or di-'rect these courts, in a trial at common law, to appoint com-'missioners for the decision of questions which a court of 'common law must submit to a jury." In *Fitch* v. *Creighton*, 24 *Howard*, 159, it was claimed in argument by Mr. SWAYNE that while states cannot direct a remedy which federal courts are bound to pursue, yet that "when the statute 'of a state creates a right which may be enforced by reme-'dies already existing and resorted to in the latter courts, 'that *these courts will enforce the right by their own known reme-'dies and usages*, in cases where they have jurisdiction, *al-'though the local statute may direct a special mode of proceed-'ing*;" and the position was sustained by the court.

But what, after all, is the constitutional right, the estate, the rule of property represented by these statutes? That an *equity of redemption* is all this, we freely concede. But what is the equity of redemption? At common law, if the mortgage debt was not paid upon the day, the estate of the mortgagee became absolute in the mortgaged lands, the condition being broken. Courts of equity to lighten this hardship allowed the debt to be paid and the land redeemed after the day and after condition broken. Gradually this favor of a court of equity came to be regarded as a settled right, as an equitable estate in the mortgagor after condition broken, and men began to file bills in chancery to foreclose and bar this equity, and upon such bills, time for

payment of the debt was always, says Mr. Justice SWAYNE, "an *incident of the remedy*." —(*Clark* v. *Reyburn*, 8 *Wallace*, 322.) It grew into an estate incident to the mortgage, which the mortgagor could not by any covenant or agreement in the mortgage waive or extinguish if he would. Now we are referred in argument to various authorities, which declare that this *equity of redemption* is an estate and a rule of property. But it does not follow, that every form and method, that from time to time may be adopted by legislative enactment in the respective states for giving effect to it, constitutes an element in this estate or rule of property. These cases assert that the equity of redemption, which rescues the mortgagor from the rigorous effect of the condition at law, has become a settled right of property. None of them, however, hold that any particular *mode* of securing that right is itself an estate in land and a right of property which is binding on the procedure of the federal courts. And it seems very clear that these statutes now in question do not of themselves create any new estate, but that they are merely one of several methods and modes of practice provided by the laws of Illinois for giving effect to the equity of redemption, which is a right, older than these statutes, and is undoubtedly, under some form, a substantial right. For example: before these statutes of 1841 substituted a period of redemption *after* the sale, it was the practice to give a considerable period therefor *before* the sale, as is now the practice questioned here, of the federal court. And this time was, as in the federal court, held subject to the control of the court and might be extended in its discretion. —(*Williams* v. *Waldo*, 3 *Scam.*, 264; *Clark* v. *Reyburn*, 8 *Wall.*, 22; *Johnson* v. *Donnell*, 15 *Ill.*, 98.) Such is the rule in the English chancery. But since these statutes have come into force it is *usual to dispense* with time for payment before sale, and to direct that the debt be paid in twenty, ten, or even five days, or that the master make sale.—(*Moore et ux.* v. *Titman*, 33 *Ill.*, 367.) On the other hand the practice of strict foreclosure, without sale, is

allowed also by the state law; but in such cases it is *held* that reasonable time should be given *before* the final decree, and that this time should not be less than the lifetime of an execution, namely, ninety days.—(*Farrell* v. *Parker*, 50 *Ill.*, 275; *Link* v. *Arch. Iron Works*, 24 *Ib.*, 552.) These various regulations show that it is not the time of redemption *after sale*, but the equity of redemption preventing the estate of the mortgagee becoming absolute, (*Story Eq. Juris.*, §§ 1012, 1013, *and* 1015,) which constitutes this inviolable *rule of property*, this *estate* in the mortgagor which is insisted upon; and that the statutes in question embody merely one mode of practice, one method of giving effect to this rule of property, and of protecting this estate.

In the English court of chancery it was the practice to give time for payment of the debt before sale or final decree in foreclosure. Time to some extent, was deemed an estate in the land, an absolute right to which the mortgagor was entitled. But the amount of the time to be allowed rested always in the control and discretion of the court. It might be more or less and varied with the varying cases before the court. The *length of the time* was matter not of right but of the practice of the court. Such also was the practice of the court of chancery in Illinois prior to the statute of 1841. Time to redeem was a right of the mortgagor; but the *extent* of it was a matter wholly in the control, and practice of the court. It is so expressly stated in *Williams* v. *Webb*, 3 Scam., 264, and *Johnson* v. *Donnell*, 15 Ill., 98. When, then, the statute intervening, made definite and fixed that which before had been left in the discretion of the chancellor, did it change its nature? It remained a matter of practice as it was before; only controlled by statute and not by the court. The original estate of the mortgagor, his equity of redemption remained. But it was, thereafter, regulated by statute controlling the practice of the court, and the conduct of the officer clothed with the process of the court.

If this special regulation appointing the time for payment after the sale instead of before it is itself an *estate in* land, it should then be upheld and protected everywhere and in all modes of enforcing the contract. But it may be cut off by the power of sale given by the parties by contract. Though given by statute in all cases of sales under execution at common law from the year 1825, it was not given under equity decrees till 1841; it is not given now, nor is *any corresponding length of time* given in strict foreclosure. It is not treated as an estate, nor upheld as such. But an equitable estate in the mortgagor after condition broken; a right to pay the debt in equity though the estate of the mortgage is become absolute at law, that is an *estate* which is upheld and protected everywhere, and equally in this court. Nor can a mortgagor divest himself of it by contract contemporaneous with the mortgage, or by any provisions or powers in his mortgage.

In this respect the case of *Clark* v. *Reyburn*, is very significant. There a decree of foreclosure had been entered which did not find the amount due on the mortgage, and "allowed no time for the payment of the debt and the redemption of the estate," but barred and foreclosed the redemption in the first instance. The question in this court was, if such a decree could be sustained? It was held that the *equity of redemption* is a distinct estate from that vested in the mortgagee before or after condition broken, and must be protected by some mode of procedure, giving time for the payment of the debt after condition broken, and after the estate of the mortgagee became indefeasible at law; that no rule of practice upon that subject in the court below being adduced, the practice must, under the 90th equity rule, be regulated by that of the High Court of Chancery in England; that in that court it was settled practice to give time for payment of the debt before foreclosure, and that a decree absolute in the first instance could not be sustained.

It follows, therefore, that while such a rule of procedure, governing the conduct of the officer executing the decree, cannot be imposed by the legislature upon the courts of the United States, those courts, nevertheless, do by their own forms and modes of procedure and process give effect to the equity of redemption to the full extent that it has ever been asserted to constitute a rule of property, or an estate in the mortgagor.

This standpoint seems to give a proper view of the extent to which the state laws existing at the time of a contract enter into its terms. A state law which furnishes a rule of property, a rule of decision within the meaning of the 34th section of the judiciary act, may enter into the contract; but "laws which relate to practice, process, or "modes of proceeding before or after judgment, are exceptions to the 34th section." — *Thompson* v. *Phillips*, 1 Bald., 274. *Wayman* v. *Southard*, 10 Wheat., 25.) Such laws relate only to the means for carrying a judgment or decree into execution. They govern necessarily the procedure in the state forum in which they apply. In that forum both jurisdiction and process are subject to legislative regulation. But the procedure and process of the courts of the United States are inviolable by the state legislatures. The law which dominates the contract and all parties to it, and empowers them to invoke for its enforcement the jurisdiction of the federal courts, empowers them to invoke with that jurisdiction the methods and process by which that jurisdiction is exercised. No man can debar himself of jurisdiction of these courts by contract. That jurisdiction is something which no contract can give or take away. Nevertheless, the federal law by which parties may choose the forum of the federal courts certainly enters into the contract as effectively as any state law giving jurisdiction to state courts; and what reason can be assigned why the forms of remedy and modes of proceeding established by acts of Congress for administering the jurisdiction

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of the federal courts, do not enter into the contract of parties with the same effect as state laws prescribing the modes and incidents of remedy in state courts? If the appellee contracted by implication to exclude the procedure, while it could not but retain the jurisdiction of the courts of the United States, then those courts must change their equity practice, without reference to the law of 1828, whenever the state legislature sees fit to change its laws.

Finally, it seems to us, that the practice in question here is in contravention of no rule or principle established by this court; that it upholds the equity of redemption, by modes of procedure established for the circuit court by act of Congress, to the full extent to which that equity of redemption exists as a rule of property; and that the practice and process founded upon acts of Congress, by which the jurisdiction of the federal courts is exercised, enter into the contract of parties as much as the law which entitles him to seek the jurisdiction of those courts.

The mode of executing these decrees impugned in this cause has been in use for more than fifty years. The titles to property of value not to be estimated rest upon it; and the value of the titles thus acquired, even within the last two years, can be estimated only by many millions. These lands have been sold to persons purchasing upon the faith of these decrees, and it is reasonable to suppose that they have in numerous cases been transferred to subsequent purchasers. It would seem that a procedure so long acquiesced in and approved by the profession and maintained by the courts, should be disturbed only upon the gravest consideration.

Edw. J. Isham
for Appellee